86-263

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROY M. MIYAMOTO,
Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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August 13, 1986

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August 13, 1986

QUESTIONS PRESENTED

1. Whether or not the attorney discipline rules of the Supreme Court of the State of Hawaii, which do not require oral argument before such court, do not provide for a standard of review by such court and/or do not require such court to provide findings of fact and conclusions of law, violated Appellant's constitutional rights under the Fifth and Fourteenth Amendments to The Constitution of the United States?

2. Whether or not the failure of the Supreme Court of the State of Hawaii to promulgate attorney discipline rules that are consistent with the Hawaii Administrative Procedures Act violated Appellant's constitutional rights under the Fifth and Fourteenth Amendments to The Constitution of the United States?

3. Whether or not the following actions of the Supreme Court of the State of Hawaii and/or its agents, in combination and/or in toto, violated Appellant's constitutional rights under the Fifth and Fourteenth Amendments to The Constitution of the United States:

a. prescribing by rules an unconstitutional blending of the roles of prosecutor, judge and jury in disciplinary proceedings;

b. precluding Petitioner from conducting investigation or discovery;

c. failing to submit the complete record of the court's Hearing Committee to the court's Board;

d. failure by the Board to record and transcribe the oral arguments before the court's Board;

e. failure by the Board to hear or have transcribed the two-day

hearing tapes or investigation tapes by the court's Board in arriving at its decision;

f. allowing the Chairman of the court's Board to serve in a conflict of interest position;

g. failing to provide Appellant notice of no oral argument before the court; and

h. not permitting Appellant to have oral argument before the court.

LIST OF PARTIES

The parties to the proceeding below are named in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	8
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	25
A. Supervision of attorneys by state courts are subject to the United States Constitution	25
B. The Disciplinary Rules of the Supreme Court of the State of Hawaii, and the application of these Rules in the present case, deprived Appellant of his Due Process	30
C. The Disciplinary Rules of the Supreme Court of the State of Hawaii, and the application of these Rules in the present case, deprived Appellant of his Equal Protection	47

CONCLUSION 58

Appendix A
Order of Suspension of the Supreme Court of the State of Hawaii, entered on April 18, 1986..... A1

Appendix B
Order denying reconsideration of Order of Suspension of the Supreme Court of the State of Hawaii, entered on May 15, 1986..... A3

Appendix C
Rules of the Supreme Court of the State of Hawaii, Rule 2 (1984)..... A4

Appendix D
Notice of Appeal to the Supreme Court of the United States, filed on August 8, 1986..... A64

Appendix E
Rules of the Disciplinary Board of the Supreme Court of the State of Hawaii, Rule 19..... A66

Appendix F
Hawaii Administrative Rules, Dept. of Commerce and Consumer Affairs, State of Hawaii, §§16-201-36 and 16-201-37 (1984)..... A72

Appendix G
Hawaii Revised Statutes §91-14 (1983)..... A77

TABLE OF AUTHORITIES

Cases:	Page
Armstrong v. Manzo, 380 U.S. 545 (1965)	33
Board of Regents v. Roth, 408 U.S. 564 (1972)	33
Disciplinary Board v. Kim, 59 Hawaii 499, 583 P.2d 333 (1978)	23
Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952)	35
Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S.889 (1972)	30
Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1886).	55
Grannis v. Ordean, 234 U.S. 385 (1914)	32
Griffin v. Illinois, 351 U.S. 12 (1956)	51
Herring v. New York, 422 U.S. 853 (1975)	37
In Re Cannon, 206 Wis. 374, 240 N.W. 441 (1932)	27
In Re Oahu Terminal Serv., Inc., 52 Hawaii 221, 473 P.2d 573 (1970)	19

In Re Noell, 93 F.2d 5 (8th Cir. 1937) 40

In Re Ruffalo, 390 U.S. 544, reh. denied, 391 U.S. 961 (1968) 28, 30

In Re Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961), reh. denied (1961). 18, 55

In Re Trask, 46 Hawaii 404, 380 P.2d 751 (1963) 18, 23

Javits v. Stevens, 382 F.Supp. 131 (S.D.N.Y. 1974) 25

Johnson v. Avery, 393 U.S. 483 (1969) 29

Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) 32

Lindsay v. Normet, 405 U.S. 56 (1972) 51

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 53

Morgan v. United States, 298 U.S. 468 (1936) 36

Ohio Ex Rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) 43

Randall v. Bingham, 74 U.S. (7 Wall.) 523 (1868) 28

Selling v. Radford, 243 U.S. 46 (1917) 28

Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) 53

Theard v. United States, 354 U.S. 278 (1957) 50

United States v. Vater, 259 F.2d 667 (2d Cir. 1958) 42

United States v. Nugent, 100 F.2d 215 (6th Cir. 1938) 36

White v. Board of Education, 54 Hawaii 10, 501 P.2d 358 (1972) 18

Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) 32

Constitutional Provisions:

U.S. Const. amend. V. 6, 30

U.S. Const. amend. XIV, §1. 6, 30

Hawaii Const. art. V, §6. 2

Statutes:

28 U.S.C. §1257(2) (1982). 5

28 U.S.C. §1257(3) (1982). 5

28 U.S.C. §2103 (1982). 5

Hawaii Rev. Stat., Chapter 91 (1986). 47

Hawaii Rev. Stat. §91-14 (1983). 49

Hawaii Rev. Stat. §605-1(a) (1976). 2

Hawaii Rev. Stat. §706-663 (1972). 10

Hawaii Rev. Stat. §706-670(3) (1984). 10

Hawaii Rev. Stat. §708-853 (1972). 10

Hawaii Rev. Stat. §710-1076 (1972). 10

Hawaii Rev. Stat. §710-1077(1)(c) (1973). 55, 57

Hawaii Rev. Stat. §710-1077(2) (1979). 56

Hawaii Rev. Stat. §710-1077(3) (1973). 56, 57

Rules:

Hawaii R. App. P. 34(b). 20, 21

Hawaii Sup. Ct. R. 2. 3, 4, 7, 17, 22, 23 25, 34, 38, 40, 44, 50, 58

Hawaii Sup. Ct. R. 2.4(e)(2) 18

Hawaii Sup. Ct. R. 2.4(e)(3) 18

Hawaii Sup. Ct. R. 2.7(b). 23

Hawaii Sup. Ct. R. 2.7(c). 23

Code of Professional Responsibility DR 1-102(A) (1970). 9

Code of Professional Responsibility DR 7-102(A) (1970) 9

Code of Professional Responsibility DR 7-109(A) (1970). 9

Rules of the Disciplinary Board of the Supreme Court of the State of Hawaii, Rule 19. 17, 19

Hawaii Administrative Rules, Dept. of Commerce and Consumer Affairs, State of Hawaii, Chapter 16-201 (1984). 48

Rules of Board of Accountancy, Dept. of Commerce and Consumer Affairs, State of Hawaii, Chapter 71 (1984). 48

Rules of Board of Examiners in Optometry, Dept. of Commerce and Consumer Affairs, State of Hawaii, Chapter 92 (1981). 48

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Hawaii Administrative Rules, Dept. of Commerce and Consumer Affairs, State of Hawaii §16-201-24. 49

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Miscellaneous:

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R. Pound, The Lawyer From Antiquity to Modern Times 87 (1958) 27, 28

The Honolulu Advertiser (March 3, 1986). 46

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROY M. MIYAMOTO,
Appellant

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

Appellant Roy M. Miyamoto respectfully files this Jurisdictional Statement to review the Order of Suspension of the Supreme Court of the State of Hawaii, entered in the above-entitled proceeding on April 18, 1986, and the Order denying reconsideration of the Order of Suspension, entered on May 15, 1986.

OPINIONS BELOW

The Order of Suspension of the Supreme Court of the State of Hawaii, and the Order denying reconsideration thereof, have not been reported. These Orders are reprinted as Appendix A and Appendix B, respectively.

JURISDICTION

This case concerns the Appellant's attorney discipline proceedings in the Supreme Court of the State of Hawaii.

Article V, Section 6, of the Constitution of the State of Hawaii provides:

> [t]he supreme court [of the State of Hawaii] shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law. (Emphasis added.)

Furthermore, Hawaii Rev. Stat. §605-1(a) provides:

> [t]he supreme court [of the State of Hawaii] may examine, admit, and reinstate as practitioners in the courts of the State, such persons as it may find qualified for that purpose, who have taken the prescribed oath of office. The supreme court shall have the sole power to revoke or suspend the license of any such practitioner.

Pursuant to this delegation of authority, the Supreme Court of the State of Hawaii, in regard to attorney discipline, promulgated Rule 2 of the Rules of the Supreme Court of the State of Hawaii, ("Hawaii Sup. Ct. R. 2").[1/]

In accordance with Hawaii Sup. Ct. R. 2, the Supreme Court of the State of Hawaii filed the Order of Suspension on April 18, 1986.

The Order of Suspension ordered that Appellant be suspended from the practice of law in the State of Hawaii for

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[1]Hawaii Sup. Ct. R. 2 is reprinted as Appendix C.

a period of eighteen (18) months and that the suspension be effective thirty (30) days thereafter, i.e. on May 18, 1986.

However, taking exception to the Order of Suspension, Appellant timely filed a Motion For Reconsideration with the Supreme Court of the State of Hawaii on April 28, 1986, challenging among others, the validity of Hawaii Sup. Ct. R. 2, on the ground that it is repugnant to The Constitution of the United States. On May 15, 1986, the Supreme Court of the State of Hawaii denied the Motion.

This Jurisdictional Statement and the Notice of Appeal to the Supreme Court of the United States[2/] are being docketed with this Court within ninety (90) days of

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[2]The Notice of Appeal to the Supreme Court of the United States, filed on August 8, 1986, is reprinted as Appendix D.

the entry of the Order denying reconsideration of the Order of Suspension.

The jurisdiction of this Court to review said Orders of the Supreme Court of the State of Hawaii is invoked under 28 U.S.C. §1257(2).

Furthermore, if the proper mode for review by this Court is by petition for writ of certiorari, then jurisdiction of this Court to review said Orders is invoked under 28 U.S.C. §1257(3).[3]/

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[3]28 U.S.C. § 2103 concerns appeals from state court improvidently taken and states, in pertinent part:

> If an appeal to the Supreme Court is improvidently taken from the highest decision of the highest court of a state ... in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari as if duly presented to the Supreme Court at the time the appeal was taken. ...

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii Sup. Ct. R. 2.

Rule 2 of the Rules of the Supreme Court of the State of Hawaii embodies the attorney discipline rules in the State of Hawaii and is reprinted as Appendix C.

STATEMENT OF THE CASE

Appellant Roy M. Miyamoto, upon certification of his good moral character and successfully passing a written examination, was admitted to the State of Hawaii Bar on May 28, 1962. From that date, Petitioner maintained his membership in the State of Hawaii Bar up until the date of his suspension. Appellant has been an officer/member of the Board of Bar Examiners of the Supreme Court of the State of Hawaii, a former Deputy Attorney General with the State of Hawaii, a former member of the attorney's staff of the State Senate, an officer/director of the Honpa Hongwanji Buddist Church, etc.

On April 12, 1983, Appellee Office of Disciplinary Counsel of the Supreme Court of the State of Hawaii ("Disciplinary Counsel") filed a Petition

for Discipline with the Disciplinary Board of the Supreme Court of the State of Hawaii ("Disciplinary Board"). Essentially, the Petition for Discipline alleged that Appellant altered a medical opinion letter of Dr. Jack Scaff. Based on this allegation, the Disciplinary Counsel charged that Appellant violated his attorney's oath and the following Disciplinary Rules ("DR") of the Code of Professional Responsibility: DR 1-102(A)(1), (2), (3), (4), (5) and (6); DR 7-102(A)(3), (4), (5), (6) and (8); and DR 7-109(A).[4/] Disciplinary Counsel further charged Appellant with violations of Hawaii Revised Statutes ("Hawaii Rev. Stat.")

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[4]DR 1-102 concerns attorney misconduct, DR 7-102 regards the representation of a client within the bounds of the law and DR 7-109 concerns contact with witnesses.

§§710-1076 and 708-853,[5/] punishable as misdemeanors by fine not exceeding $1,000.00 and imprisonment up to one year. Hawaii Rev. Stat. §§706-670(3) and 706-663. Accordingly, the Disciplinary Counsel requested that this matter be assigned to a hearing committee and that formal disciplinary proceedings be commenced to provide a recommendation to the Disciplinary Board concerning the appropriate discipline that should be imposed upon Appellant.

Subsequently, the Chairman of the Disciplinary Board, C. Frederick Schutte ("Disciplinary Board Chairman"), duly approved formal disciplinary proceedings

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[5]Hawaii Rev. Stat. §710-1076 sets forth the penal action of tampering with physical evidence.

Hawaii Rev. Stat. §708-853 establishes the penal action of forgery in the third degree.

and assigned this matter to the Disciplinary Board's Hearing Committee ("Hearing Committee"). The Disciplinary Board Chairman appointed a member of his private law firm to chair the Hearing Committee.[6]

Prior to the commencement of the hearing on June 15, 1983, Appellant requested that he be allowed to conduct an investigation and/or discovery. The Disciplinary Counsel denied this request. Instead, the Disciplinary Counsel advised Appellant that he would be welcome to listen to taped interviews of witnesses (but not permitted to attend the interviews) that were conducted by the Disciplinary Counsel. Unfortu-

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[6]Appellant believes that the Disciplinary Board Chairman served in a conflict-of-interest position by both approving the Disciplinary Counsel's recommendation for institution of formal proceedings and participating in the Disciplinary Board's proceedings and determinations.

nately, or by design, the Disciplinary Counsel did not furnish Appellant with taped interviews of all witnesses that testified at the hearing before the Hearing Committee.

The hearing before the Hearing Committee was held on June 15, 1983 and December 15, 1983. Between these dates, Appellant had to undergo emergency cardiovascular surgery for a dissecting aorta on July 29, 1983, and returned to his practice on a part-time basis in mid-October 1983. At the hearing, no witness had any direct evidence of Appellant having altered the document in question. And, while the Disciplinary Counsel's claimed documents expert testified that the alteration could be effected by a "cut and tape" technique, he also admitted that such could also be effected by a "white-out and over type"

technique. Based upon the expert's conclusions, Appellant submits that he could not have performed the "white-out and over type" since the document's grayish tinge required a special order "gray white-out," which was unavailable to Appellant. Furthermore, the Disciplinary Counsel's expert was unable to distinguish paper quality and to identify most of the corrections on a xerox copy.

The document in question was a workers' compensation medical rating report (in letter form) by a physician, Dr. Jack Scaff, that was addressed to Appellant. Appellant did not receive the original, but rather a reproduced copy which contained the alleged alteration. The original was never produced. The physician's copy and that of the opposing attorney, although containing other similar alterations or

"white-out" corrections, did not evidence the questioned alteration or "white-out" correction present in Appellant's copy. Appellant contended that his copy obviously was a later draft of the draft produced by the physician and opposing counsel. Appellant further testified that he did not question receiving a reproduced copy rather than the original because Appellant had encountered the same procedure with Dr. Scaff in a prior case.

Dr. Scaff's office procedure in transcribing letters was somewhat less than desirable. Dr. Scaff after dictating a letter would place the tape in an out-tray. The tape would be picked up by his nurse, hereafter "Nurse A," who would transport the tape to the typist, hereafter "Nurse B." Nurse B would transcribe it in final letter form and when completed would

place it in her receptacle to be picked up by Nurse A to be transported to Dr. Scaff for signature. A xerox copy would be placed in the file by Nurse A, sometimes before and sometimes after the letter was signed. If any corrections were made by Dr. Scaff, the original letter would be transported back to Nurse B by Nurse A for corrections to the original. Nurse B rather than retyping the whole letter would "white-out" and type in the correction only. At the hearing, Dr. Scaff's staff testified that Dr. Scaff would sometimes sign an original letter before the final corrections were completed. Appellant speculates and so testified that the xerox copy contained in Dr. Scaff's files was a letter correction prior to the reproduced copy Appellant received. It appears that the original had been corrected here after

signature by Dr. Scaff and xeroxing by Nurse A. It would appear that someone made a further correction which resulted in Appellant's copy. What complicates the case further is that Dr. Scaff and Nurse A went on vacation at the time the questioned document was corrected, copied and mailed. Instead, a substitute nurse did the actual transporting, xeroxing and mailing of the letter. How opposing counsel received the prior draft, how Appellant received the questioned document, and how the original document disappeared remains a mystery that has been resolved against the Appellant without adequate Due Process.

The Hearing Committee made its recommended findings of fact, conclusions of law and decision of suspension for three years, and forwarded the same to the Disciplinary Board. The proceeding before

the Hearing Committee was tape recorded but not transcribed until the record was filed with the Supreme Court of the State of Hawaii. The tape recordings of the two-day hearing was not furnished to the Disciplinary Board. Contrary to Disciplinary Board Rule 19[7], minutes of the Hearing Committee were not kept or furnished to the Disciplinary Board.

In congruence with Hawaii Sup. Ct. R. 2 to make an independent review of

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[7]Disciplinary Board Rule 19 concerns the records of the Hearing Committee and the Disciplinary Board and is reprinted as Appendix E.

attorney discipline matters[8/], the Disciplinary Board held a hearing at about 2:00 P.M. on October 11, 1984, after having postponed the hearing for September 27, 1984, due to the disqualification of Disciplinary Board Members, Linda Luke, Marjorie Manuia and Martin Luna. These members expressed that they were personal

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[8]Hawaii Sup. Ct. R. 2.4(e)(2) and (3) authorizes the Disciplinary Board to appoint the Chief Disciplinary Counsel and staff, as well as the Hearing Committee. Appellant notes that by consolidating the roles of prosecutor, judge and jury into the Disciplinary Board, Appellant's due process right to a full, fair and impartial hearing is violated. In Re Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961). In In Re Trask, 46 Hawaii 404, 380 P.2d 751 (1963), the Supreme Court of the State of Hawaii agreed with In Re Schlesinger, supra, in ruling that a fair trial by an impartial tribunal is essential to due process. The concern to prevent even the probability of unfairness was voiced by the Supreme court of the State of Hawaii even in an administrative proceeding prescribing participation or attendance at executive sessions where decisions are reached. White v. Board of Education, 54 Hawaii 10, 501 P.2d 358 (1972).

friends of and/or received legal assistance from Appellant. Oral argument was presented at the hearing by both Appellant and Disciplinary Counsel. The proceedings before the Disciplinary Board were not recorded and transcribed, and minutes[9/] of its deliberations were not kept contrary to Disciplinary Board Rule 19.[10/]

About an hour after oral arguments were concluded on October 11, 1984, Appellant was verbally advised by the Disciplinary Counsel by telephone of the unfavorable recommendation of the Disciplinary Board. Thereafter, on October 17, 1984, the

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[9]As to administrative proceedings under the Hawaii Administrative Procedures Act, the Supreme Court of the State of Hawaii ruled that the agency's order must conform to decision as reflected in agency minutes. In Re Oahu Terminal Serv., Inc., 52 Haw. 221, 473 P2d. 573 (1970).

[10]See n. 7, supra.

Disciplinary Board issued its recommended findings of fact, conclusions of law and decision of suspension for three years, and submitted it to the Supreme Court of the State of Hawaii.

Appellant objected to the Disciplinary Board's recommendation and filed his Opening Brief with the Supreme Court of the State of Hawaii on December 17, 1984. The Disciplinary Counsel filed its Answering Brief on January 28, 1985. This was followed by Appellant's Reply Brief which was filed on February 7, 1985. No oral argument was had before the Supreme Court of the State of Hawaii. Furthermore, notice that no oral argument would not be had was not provided to the parties as required by Hawaii Rules of Appellate Procedure,

Rule 34(b).[11] On April 18, 1986, the Supreme Court of the State of Hawaii issued its Order of Suspension. The court decided that Appellant be suspended from the practice of law in the State of Hawaii, effective May 18, 1986, for one-half the period that was recommended by the Disciplinary Board, i.e. eighteen (18) months. The court simply stated that it had considered the Disciplinary Board's report and recommendation and the briefs and filed records in reaching its decision. However, the court did not state a findings of

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[11] Hawaii R. App. P. 34(b) states:

> The clerk of the Supreme Court shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for the allowance of additional time to argue must be made by motion filed within one week of such notification. (Emphasis added.)

fact or conclusions of law, nor did it state whether it adopted all or merely a portion of the particular findings of fact and/or conclusions of law of the Disciplinary Board in reaching its decision - a reduction in sanction.[12] Was the reduction in sanction an act of solace, compromise or recognized weakness in the Disciplinary Board's findings? Furthermore, the court did not state the standard or standards of

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[12] Hawaii Sup. Ct. R. 2 does not require the Supreme Court of the State of Hawaii to provide any findings of fact or conclusions of law in its order of discipline.

review that it applied.[13]/

Appellant took exception to the Order of Suspension and filed a Motion For Reconsideration with the Supreme Court of

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[13]Hawaii Sup. Ct. R. 2 does not provide for a standard of review by the Supreme Court of the State of Hawaii.

Although Hawaii Sup. Ct. R. 2.7(b) provides that the "findings of the hearing committee shall be supported by a preponderance of the evidence" (emphasis added), Hawaii Sup. Ct. R. 2.7(c), which concerns review by the Disciplinary Board and the court, does not reciprocally adopt this standard of review.

The Hawaii case law demonstrates that the Supreme Court of the State of Hawaii has no set standard of review. Disciplinary Board v. Kim, 59 Hawaii 449, 583 P.2d 333 (1978); In Re Trask, 46 Hawaii 404, 380 P.2d 751 (1968). In Kim, supra, at 452, the court stated that the attorney "misconduct must be shown by clear and convincing evidence before disciplinary action will be taken ..." (Emphasis added.) Inconsistently, however, the court held in In Re Trask, supra, at 411, that the charge against the respondent was "clearly and satisfactorily supported by a preponderance of the evidence." (Emphasis added.)

the State of Hawaii on April 28, 1986. In his Motion, Appellant raised, among other things, certain points of law, fact and disciplinary rules adopted and/or applied, and contended that these points, individually, in combination and/or in toto, deprived Appellant of his constitutional rights. Therefore, Appellant prayed that the matter be remanded to the Disciplinary Board with instructions to permit Appellant to conduct investigation and discovery on remand and/or that Appellant be allowed to present oral argument before the Supreme Court of the State of Hawaii. The Supreme Court of the State of Hawaii denied the Motion on May 15, 1986.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Supervision of attorneys by state courts are subject to the United States Constitution.

Appellant is aware of the policy that where a state judiciary has control over the membership of its own bar, a federal court should not interfere with attorney disciplinary proceedings. This argument has been pointed out in Javits v. Stevens, 382 F.Supp. 131 (S.D.N.Y. 1974):

> The intimate and delicate relationship between courts and lawyers has long justified the [state] judiciary's careful scrutiny of the integrity and qualifications of those who practice before it. Id. at 141.

However, this argument confuses deference with abnegation of responsibility to enforce the Constitution. A brief review of the history of disciplinary proceedings may be useful in explaining how Hawaii Sup. Ct. R. 2 arrived to its present

state of development. While the practice of States to leave discipline to the courts follows tradition, custom does not justify ignoring constitutional rights of attorneys.

State courts have broad power over attorneys practicing before it. This power was inherited from English practice. As early as the thirteenth century, the English Parliament passed several statutes concerning rules and penalties relating to the practice of law. These were to be administered and enforced by the court. H. Cohen, A History of the English Bar to 1450, 189-195 (1929).

As its numbers grew, the bar developed into two main groups. One group consisted of the aristocratic, learned, and well organized "barristers," who argued before the courts. During the fourteenth and fifteenth centuries, the barristers began

to organize in various Inns of Court, each of which prescribed admission and discipline requirements for their members. R. Pound, The Lawyer From Antiquity to Modern Times, 87-88 (1958). Supervisory or reviewing power over the various Inns was retained by the judges, especially with regard to disbarment. In Re Cannon, 206 Wis. 374, 386-387, 240 N.W. 441, 446 (1932); R. Pound, The Lawyer from Antiquity to Modern Times, supra, at 98-100.

The other group, "solicitors" or "attorneys," were usually drawn from the clerks of the court and were largely unorganized until the nineteenth century. Id. at 86. A solicitor or attorney was admitted by the individual court in whose jurisdiction he/she was to practice and was directly disciplined by the court. Id. at 100; In Re Cannon, 206 Wis. 374, 386, 240

N.W. 441, 446 (1932).

This tradition of court supervision was followed in the colonies. R. Pound, The Lawyer From Antiquity to Modern Times, supra, at 136-137.

After the Civil War, the authority of courts in the United States continued over attorneys as necessary to insure the profession's integrity. See, Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868). This Court recognized that state and federal courts have autonomous disciplinary authority over the conduct of the lawyers that practice before them. In Re Ruffalo, 390 U.S. 544 (1967), reh. denied, 391 U.S. 961 (1968). Generally, the federal courts follow state disciplinary decisions since they rely upon the state's thoroughly developed admission and disciplinary procedures. Selling v. Radford, 243

U.S. 46 (1917).

Although States may properly delegate the enforcement of attorney discipline to the judiciary, it should not be allowed to sidestep constitutional guarantees. As this Court stated in Johnson v. Avery, 393 U.S. 483 (1969):

> The power of the States to control the practice of law cannot be exercised so as to arrogate federally protected rights. Id. at 490 n. 11.

Thus, the power of States to discipline attorneys is not immune from attack. Any citizen, including a disciplined attorney, should not be deprived of rights protected by the Constitution. In this regard, disciplinary proceedings may be particularly susceptible to abuse because of their summary character. Lyman, State Bar Discipline & The Activist Lawyer, 8 Harv. C.R. - C.L.L.Rev. 235 (1973).

B. The Disciplinary Rules of the Supreme Court of the State of Hawaii, and the application of these Rules in the present case, deprived Appellant of his Due Process.

When one is faced with a criminal or a quasi-criminal prosecution, strict adherence to the full spectrum of due process protections is guaranteed. U.S. Const. amends. V, XIV.

A determination of suspension or disbarment, capable of destroying an attorney's reputation and livelihood, can understandably be a devastating sanction. For this reason this Court has labeled disbarment proceedings as being "of a quasi-criminal nature." In Re Ruffalo, 390 U.S. 544, 551 (1967), reh. denied, 391 U.S. 961 (1968). The Second Circuit stated in Erdmann v. Stevens, 458 F.2d 1205, 1209-10 (2d Cir.), cert. denied, 409 U.S. 889 (1972):

> [I]n our view a court's disciplinary proceeding against a member of its bar

> is comparable to a criminal rather than a civil proceeding. ... [I]t cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. (citations omitted.) Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment -loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions. ...

No one, including the Appellant, denies that States have an interest in orderly procedures for adjudicating attorney disciplinary proceedings. The obligation of States to provide effective discipline must be weighed against the significant individual rights at stake. Due Process requires that the procedures utilized in legal proceedings be appropriate and just. As Justice Goldberg stated:

> Certainly lawyers and courts should be particularly sensitive of, and have a

> special obligation to respect, the commands of due process.

Willner v. Committee on Character & Fitness, 373 U.S. 96, 106 (1963). "[W]hen a State seeks to ... disbar a lawyer, it must proceed according to the most exacting demands of due process of law." Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 174 (1971) "[I]ts members ... should not be disciplined ... without full and unquestioned due process of law and protection of all their constitutional rights." Id. at 185.

This Court has propounded that the "fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). Furthermore, particularly when a person's good name, integrity, reputation or honor is at stake because of judicial action, a full and fair hearing should

include, at the very minimal, notice of the charges or complaint, disclosure of the evidence supporting the charges, and an opportunity to be heard and to confront and cross-examine witnesses. (Emphasis added). Board of Regents v. Roth, 408 U.S. 564 (1972). Thus, Due Process requires that the hearing "be granted ... in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In the present case, Appellant was denied the opportunity to be heard before the Supreme Court of the State of Hawaii. Instead, the Supreme Court of the State of Hawaii, in the exercise of its original jurisdiction, merely considered the Disciplinary Board's recommendations and reached its decision without oral argument and without any explanation of its

decision. 14/ Furthermore, the weight of the Disciplinary Board's recommendation, which is primarily based on the Hearing Committee's findings and recommendation, should be substantially lessened in view of the Disciplinary Board's role of appointing the Chief Disciplinary Counsel and his/her staff as well as appointing the Hearing Committee. Hawaii Sup. Ct. R. 2 violates Appellant's Due Process in that it consolidates the roles of prosecutor, judge and jury into the Disciplinary Board.15/

When the credibility of witnesses is at issue, a meaningful hearing should include their appearance before the ultimate trier-of-fact and decision maker, so that

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14See Order of Suspension reprinted as Appendix A.

15See n. 8.

it can observe their demeanor. In Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952), Judge Learned Hand stated:

> It is true that the carriage, behavior, bearing, manner and appearance of a witness - in short, his demeanor - is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

In criminal and quasi-criminal cases, "The one who decides must

hear," Morgan v. United States, 298 U.S. 468, 481 (1936), and not merely hear, recommend, then allow another tribunal to decide without hearing. The United States Court of Appeals for the Sixth Circuit explained:

> The trial judge has the right and duty to observe the bearing and demeanor of the witnesses, and where the evidence is conflicting he may take those things into account. Such personal observations cannot be transferred to the printed page, and yet the judge may, and often must, give them weight in making his decision.

United States v. Nugent, 100 F.2d 215, 217 (6th Cir. 1938).

Here, the Supreme Court of the State of Hawaii at no time observed the witnesses to decide for itself, who was telling the truth. This was especially important in this case where the central issue was the credibility of the witnesses.

The importance of oral argument before the fact finding and deciding court

cannot be underestimated. Oral argument is needed to assist the court in drawing inferences and evaluating the probative value of the evidence. It is an essential part of a trial or hearing which cannot be denied to a litigant. This Court has ruled as unconstitutional a New York practice that permitted the court to deny counsel the opportunity to make a summation at the end of a criminal case tried without a jury. Herring v. New York, 422 U.S. 853 (1975). In Herring, this Court stated:

> There can be no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial. ... [T]he overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a non-jury criminal trial is a denial of the basic right of the accused to make his defense. ... [T]here can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all. ... In denying the appellant this right under

> the authority of its statute, New York denied him the assistance of counsel that the Constitution guarantees.

Id. at 857-863.

Hawaii Sup. Ct. R. 2, which did not provide Appellant with oral argument before the Supreme Court of the State of Hawaii, the nisi prius court, deprived Appellant of his Due Process.

Note that at the appellate level, judges and attorneys have expressed the view that oral argument, providing the opportunity for an exchange between court and counsel, often significantly affects the decision. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 66 (1975). An impressive 90% of the attorneys questioned in an extensive survey of attorney attitudes in three circuits agreed that:

> [J]udges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case.

Id. at 67.

Additionally, minimal Due Process requires that a decision maker limit itself to the record, to the legal evidence adduced at the hearing, to the applicable rules of law, and to sound exercise of discretion. Without any written statement from the decision maker, there is no assurance that these requirements are met. Professor Llewellyn's observations on this subject should be noted:

> Plainly, ... [letting counsel feel that the case has been dealt with carefully and fairly] is one function and no slight one; but surely at our present juncture an equally, a more important office is to let the winner (and incidentally the loser, and not at all incidentally, any member of the bar) get some working idea of what

did the scoring for the victory.

K. Llewellyn, The Common Law Tradition: Deciding Appeals 290 (1960).

In the present case, the decision maker's, the Supreme Court of the State of Hawaii, failure to provide or indicate findings of fact or conclusions of law, deprived Appellant of his minimal Due Process. Accordingly, Hawaii Sup. Ct. R. 2 is unconsitutional in that it does not require the court to provide or indicate its findings of fact or conclusions of law.

In a case that comes close in point to that of the Appellant, a federal court has ruled that a state court's order of suspension of an attorney should not be recognized by a federal court where the state procedure did not permit an opportunity to be heard before the court and thus, was lacking in due process. In Re Noell, 93

F.2d 5 (8th Cir. 1937). In Noell, following the filing of charges against the attorney, the court appointed a commissioner to hear and report his findings of fact and recommendations. The commissioner recommended a two-year suspension and forwarded the testimony and briefs to the court. The parties were permitted to make exceptions, but there were no oral or written arguments. The Noell Court stated:

> Without argument, without a hearing, without affording the respondent an opportunity to be heard, that court overruled all exceptions to the commissioner's report and entered the order of suspension ... Id. at 6.

The pertinent Missouri statute, like that of the State of Hawaii, provided that the court had the power to disbar or suspend, although it could appoint a commissioner to hear the evidence. The argument that the requirements of Due Process were satisfied by the combination

of the hearing before the commissioner and the brief available to the court was rejected:

> [T]he hearings before the commissioner were not hearings before the court. ... [I]t is apparent that that court at no time afforded the respondent an opportunity to be heard before it upon the merits of the controversy which it alone had the power to determine.

Id. at 7.

Admittedly, the court in Noell did not have the advantage of having written briefs specifically directed toward the ultimate disposition. But this additional factor cannot remedy the lack of due process afforded to the Appellant:

> [They] were entitled to a trial of the issues and that means nothing less than that the trier of facts should hear the evidence. This important constitutional right is the essence of our system of justice and its denial is a violation of the guarantee of due process.

United States v. Vater, 259 F.2d 667, 674 (2d

Cir. 1958). Without hearing the arguments of counsel and after merely reading a cold record, the Supreme Court of the State of Hawaii, in exercising original jurisdiction, rendered its decision of suspension, depriving Appellant of a meaningful hearing before the trier of fact.

While it is generally true that Due Process does not require a state to provide parties with appellate review, that is not true where, as here, the State of Hawaii has failed to provide for a full and fair hearing in the court of original jurisdiction. In Ohio Ex Rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 80 (1930), it was stated:

> As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.

The Supreme Court of the State of Hawaii does not afford a party a fair hearing - it may impose discipline without ever hearing testimony or arguments of the subject attorney, and without ever observing witnesses or parties. The ability of the Supreme Court of the State of Hawaii, pursuant to Hawaii Sup. Ct. R. 2, to allow oral argument at its discretion[16] strikes at the very heart of Appellant's lack of Due Process. It not only can lead to arbitrariness by the decision maker, but it may cause detection of arbitrary conduct to be more difficult in any review of the decision.

Furthermore, Hawaii Sup. Ct. R. 2 is consitutionally defective in that the opportunity to cross-examine the State's

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[16] See n. 11, supra.

witnesses against him before the Supreme Court of the State of Hawaii. Because Appellant was denied the right to confrontation, the decision maker, the Supreme Court of the State of Hawaii, was not given the opportunity to observe the demeanor of the Disciplinary Counsel's witnesses in comparision to that of the Appellant. The fact that the witnesses and Appellant appeared before the Hearing Committee does not cure this consitutional defect.

The Supreme Court of the State of Hawaii further deprived Appellant of Due Process by publically announcing, after the filing of briefs, that the matter was being

remanded to the Disciplinary Board.[17] However, without such remand or opportunity

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[17]On March 3, 1986, Ken Kobayshi, a Honolulu Advertiser Courts reporter, wrote:

> The board, which is charged with overseeing attorney misconduct, recommended the trhree year suspension to the high court in October 1984. The final legal brief was filed on Feb. 7 last year.
>
> The court file indicates that no action has been taken by the high court, bu the court's staff attorney Matthew Goodbody said the high court has 'been in touch with the disciplinary board and has asked the board to review the case further.'
>
> Goodbody said he didn't know the reason for the request nor why the court record doesn't reflect the referral.
>
> * * *
>
> Disciplinary Counsel Gerald Kibe said he doesn't know of any other case in which the high court has referred a matter back to the board in this fashion.

The Honolulu Advertiser, March 3, 1986, at A-3, col. 2 and 3.

for oral arguments, the court entered the Order of Suspension without findings of fact or conclusions of law. This action of the Supreme Court of the State of Hawaii deprived Appellant of more than just his Due Process.

C. The Disciplinary Rules of the Supreme Court of the State of Hawaii, and the application of these Rules in the present case, deprived Appellant of his Equal Protection.

The State of Hawaii sets forth its public administrative procedures in Chapter 91 of the Hawaii Revised Statutes ("Hawaii Rev. Stat."), as amended, which is commonly referred to as the "Administrative Procedures Act." This Act governs the disciplinary procedures for accountants, optometrists, dentists, and medical examiners, among

others.[18]/

Complimentary to the Adminstrative Procedures Act are the State of Hawaii Administrative Rules, promulgated by the State of Hawaii, Department of Commerce and Consumer Affairs, Chapter 16-201 (1984). The hearing requirements of the Hawaii Administrative Rules are set forth in

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[18]Chapter 71, Rules of Board of Accountancy, Department of Commerce and Consumer Affairs, State of Hawaii, May 29, 1984.

Chapter 92, Rules of the Board of Examiners in Optometry, Department of Commerce and Consumer Affairs, State of Hawaii, June 12, 1981.

Chapter 79, Rules of the Board of Dental Examiners, Department of Commerce and Consumer Affairs, State of Hawaii, February 3, 1981.

Chapter 85, Rules of the Board of Medical Examiners, Department of Commerce and Consumer Affairs, State of Hawaii, April 27, 1983.

Sections 16-201-36 and 16-201-37.[19]/

Hawaii Rev. Stat. §91-14 and Hawaii Administrative Rules §16-201-24 provide for judicial review, and state in pertinent part:

> (a) Any party aggrieved by a final decision or order of the authority or by a preliminary ruling or order of the authority of such a nature that deferral of review pending the entry of a subsequent final order would deprive that party of adequate relief is entitled to judicial review. ...

Thus, these administrative laws provide for a judicial hearing which may include a trial de novo, including the right of trial by jury.[20]/

While Appellant recognizes that relief from state disbarment proceedings

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[19]Hawaii Administrative Rules §§16-201-36 and 16-201-37 are reprinted as Appendix F.

[20]Hawaii Rev. Stat. §91-14 is reprinted as Appendix G.

can only be had upon proof of a federal constitutional violation, Appellant submits that serious constitutional violations[21] have occurred here.

The constitutional violation exists here wherein accountants, optometrists, dentists, and medical examiners, among others, are accorded judicial review in the form of a hearing or trial de novo when they are aggrieved by a final decision or order from an administrative hearing. Yet Appellant as an attorney is denied a hearing or trial de novo.

Hawaii Sup. Ct. R. 2 does not provide for any sort of review for attorney discipline. Even the English system upon which our disciplinary system is based, provides for an appeal from the findings

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[21] Theard v. United States, 354 U.S. 278 (1957).

and order of the Disciplinary Tribunal to a divisional court of the Queen's Bench Division, and from there with leave to the House of Lords. P. A. Leach, The New Look in Disciplinary Enforcement in England, 61 A.B.A.J. 212, 213 (1975).

A state need not provide a right to appeal. Griffin v. Illinois, 351 U.S. 12, 18 (1956). But once a state provides an appellate process, it may not arbitrarily deny an appeal to a selected class of litigants. This Court explained in Lindsay v. Normet, 405 U.S. 56 (1972):

> When an appeal is afforded ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating The Equal Protection Clause. Id. at 77.

An analysis of the functions of appellate courts discloses their significant role. As Professor Kurland says:

> Any appellate court has at least three distinct functions to perform. The

> first is that of correcting erroneous decisions rendered by judicial tribunals inferior to it in the judicial hierarch. The second is to maintain a consistency among the decisions of these lower courts subordinate to it, so that the law is evenhandedly applied within the system. The third is the law making function of creating and amending rules of law, not only so that they may be followed by lower courts within the system, but also to provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies.

Kurland, Jurisdiction of the United States Supreme Court: Time for a Change?, 59 Cornell L.Rev. 616, 618 (1974). Of worthy note to this case is the function to speak directly to the litigant about his claim of defense. Here, since no oral argument or reconsideration was granted to Appellant, this appellate obligation was never met. Moreover, the Supreme Court of the State of Hawaii, the decision maker, never apprised the Appellant as to all or

the portion of the Disciplinary Board's recommendation that had been affirmed, or how the Disciplinary Board viewed witness credibility. The law must not only do justice, but it also must show that it does justice. Lasky, Observing Appellate Opinions From Below the Bench, 49 Calif.L.Rev. 831, 835 (1961).

Separate treatment of attorneys from other professions in not providing attorneys a right to trial de novo is unconstitutional if, according to the traditional formulation, that classification does not bear a rational relationship to a legitimate governmental objective. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). Where appropriate a legislature may regulate different professions in different manners. But the differing regulations must not be discriminatory.

Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935).

The State of Hawaii, however, through its supreme court, fails to present distinctions which justify its choice to deny attorneys a trial de novo, which are included in the administrative procedures as of right. It is agreed that the state has a high duty "to preserve public confidence in the judicial institution and to protect the court and public from misconduct." Note, The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 Colum.L.Rev. 1039 (1952). However, it is equally true that the State of Hawaii owes the same duty to protect the public with regard to other professionals - accountants, optometrists, dentists, and medical examiners - who can also cause great injury. There is no rational basis

for unequal treatment of attorneys. The right to practice law is a constitutionally protected property right. In Re Schlesinger, 404 Pa. 584, 172 A.2d 835, 840 (1961), reh. denied (1961). Stated otherwise, this Court long ago stated:

> The attorney and counsel, being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor.

Ex parte Garland, 4 Wall. 333, 379, 71 U.S. 333, 379 (1886).

In this case we are concerned with the procedural safeguard of an appeal from a final decision which imposes a grievous sanction. The State of Hawaii gives no reason for denying this important right to attorneys while affording it to other professionals.

Another instance of Equal Protection denial occurs under the State of Hawaii contempt law Hawaii Rev. Stat.

§710-1077(1)(c). This statute imposes criminal penalties if a person is found guilty, "As an attorney, clerk, or other officer of the court, he knowingly fails to perform or violates a duty of his office, or knowingly disobeys a lawful directive or order of a court; or... ."

The court may treat criminal contempt of court as a misdemeanor or petty misdemeanor. Hawaii Rev. Stat. §710-1077(2) and (3).

Hawaii Rev. Stat. §710-1077(2) and (3) draw a distinction between offenses committed in the presence of the court and contempt offenses occurring outside the immediate view and presence of the court. If the offense is committed in the immediate view and presence of the court, the court may order summary conviction and disposition. However, if the offense

is not committed in the immediate view and presence of the court, the defendant has a right to trial without jury, and, proof of guilt beyond a reasonable doubt shall be required for conviction.

In this case had the Appellant's alleged wrongful conduct been prosecuted as criminal contempt under Hawaii Rev. Stat. §710-1077(1)(c), Appellant would have been allowed a trial since the alleged conduct occurred outside the presence of the tribunal.[22]/ The point being that Appellant would be allowed a hearing or trial for contempt, yet be denied a hearing or trial in attorney discipline proceedings based upon the same conduct.

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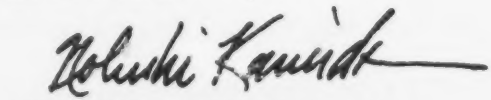
[22]Hawaii Rev. Stat. § 710-1077(3).

CONCLUSION

For the above stated reasons, this Court should review this appeal and stay the Order of Suspension pending determination herein. If Appellant is correct in urging that Hawaii Sup. Ct. R. 2 is unconstitutional and/or that certain acts of the Supreme Court of the State of Hawaii in regard to Appellant's attorney discipline proceeding were unconstitutional, then this matter should be reversed and/or remanded for redetermination consistent with the orders of this Court.

Respectfully submitted,



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August 13, 1986

APPENDIX A

NO. 10226

IN THE SUPREME COURT OF THE STATE OF HAWAII

[Filed April 18, 1986]

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, vs. ROY M. MIYAMOTO, Respondent.	ODC 1125

ORDER OF SUSPENSION

This court having considered the Disciplinary Board's "Report and Recommendation for the Suspension of Roy M. Miyamoto from the Practice of Law for a Period of Three (3) Years" and the briefs and records filed in this court; and concluding that the suspension of Respondent Miyamoto is

necessary, but further concluding that the recommended suspension period of 3 years should be reduced to 18 months,

IT IS HEREBY ORDERED that Respondent Miyamoto is suspended from the practice of law in this jurisdiction for a period of 18 months, effective 30 days hereafter pursuant to Supreme Court Rule 2.16(c). Respondent shall comply with Rule 2.16 and any other applicable provisions of Supreme Court Rule 2.

APPENDIX B

NO. 10226

[Filed May 15, 1986]

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,	ODC 1125
Petitioner,	(Filed May 15, 1986)
vs.	
ROY M. MIYAMOTO,	
Respondent.	

ORDER

Upon consideration of Respondent's Motion for Reconsideration of Order of Suspension,

IT IS HEREBY ORDERED that the motion is denied.

APPENDIX C

Rule 2. DISCIPLINARY RULES.

2.1 Jurisdiction. Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established.

Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any bar association from censuring a member or suspending or expelling a member from membership in the association.

(Renumbered September 1984.)

2.2 Grounds for Discipline.

(a) The Code of Professional Respon-

sibility, attached hereto as Exhibit A, as amended by this court shall govern the conduct of all attorneys subject to discipline under this rule.

(b) Acts or omissions by an attorney which violate the Code of Professional Responsibility shall constitute misconduct and shall be ground for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. Conviction of a crime shall similarly be ground for discipline as set forth in Rule 2.13.

(Renumbered September 1984.)

2.3 Types of Discipline. Discipline may consist of:

(a) Disbarment by the supreme court; or

(b) Suspension by the supreme court for a period not exceeding five years; or

(c) Public censure by the supreme court; or

(d) Public reprimand by the Disciplinary Board with the consent of the respondent;

(e) Private reprimand by the Disciplinary Board with the consent of the respondent; or

(f) Private informal admonition by Disciplinary Counsel. In addition, restitution and/or payment of costs (exclusive of attorney's fees) may be ordered by this court, or, if consented to by an attorney, may be included among the terms of a public or private reprimand by the Board.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.4 Disciplinary Board.

(a) The supreme court shall appoint a board to be known as the "Disciplinary

Board of the Hawaii Supreme Court" (hereinafter referred to as the "Board") which shall consist of eighteen members, one of whom shall be designated by this court as chairman and another as vice-chairman.

(b) All members shall be appointed to staggered three-year terms; however, to maintain a Board with staggered terms, initial appointments may be for less than three years. The Board shall act only with the concurrence of seven or more members. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(c) Board members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If, in any given case, it shall become necessary for the continuation

of a case, or the orderly operation of the Board, the supreme court may appoint, for that case only, one or more ad hoc members as it deems necessary. Each ad hoc member shall fulfill all the responsibilities of a Board member.

(d) Periodically, the Chairman shall designate two Board members to review the proposed decisions of the Disciplinary Counsel, as mentioned in subsection 2.7 hereof.

(e) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Disciplinary Rules, including the power and duty:

(1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as

shall be appropriate to effectuate the purposes of these Disciplinary Rules.

(2) To appoint a Chief Disciplinary Counsel, and such Assistant Disciplinary Counsel and staff as may from time to time be required to properly perform the functions hereinafter prescribed. The Chief Disciplinary Counsel and Assistant Disciplinary Counsel are hereinafter referred to as "Counsel".

(3) To appoint from time to time, and establish the terms of office of, an appropriate number of hearing committees.

(4) To approve assignments made annually by the Chairman for rotation of members of the Board to review for stated periods all recommended dispositions by Counsel and to authorize changes in such assignments from time to time necessitated by unforeseen circumstances.

(5) To adopt rules of procedure governing the Board and hearing committees which are not inconsistent with these rules.

(6) To adopt and publish advisory opinions interpreting the Code of Professional Responsibility.

(7) To collect from every attorney admitted to practice before this court the periodic assessment required under Rule 2.18(a); to prepare and maintain appropriate accounting records showing the receipt and disposition of those funds, which records shall be subject to audit; and to prepare an annual budget for the expenditure of those funds.

(Amended November 20, 1979, effective November 20, 1979; renumbered September 1984.)

2.5 Hearing Committees.

(a) Each hearing committee shall

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consist of three members, at least two of whom shall be members of the bar of this state. The Board shall designate the terms of its members and the chairman for each committee. Each committee shall act only with the concurrence of a majority of its members. Committee members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(b) Hearing committees shall have the power and duty to conduct hearings in formal disciplinary proceedings and on petitions for reinstatement of disbarred or suspended attorneys, upon assignment by the Chairman of the Board, and to submit their

findings and recommendations, together with the record of the proceeding, to the Board.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.6 Disciplinary Counsel.

(a) Counsel shall not engage in private practice, except that the Board may agree to a reasonable period of transition after appointment

(b) Counsel shall have the power and duty:

(1) With the approval of the Board, to employ and supervise staff needed for the performance of his duties.

(2) To investigate all matters involving alleged misconduct called to his attention whether by complaint or otherwise.

(3) To dispose, subject to review by members of the Board assigned by the Chairman, of all matters involving alleged

misconduct by dismissal, private informal admonition or the institution of formal disciplinary proceedings before a hearing committee. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Counsel until the accused attorney shall have been afforded the opportunity to state his position with respect to the allegations against him.

(4) To file with the supreme court certificates of conviction of attorneys for crimes.

(5) To prosecute all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing committees, the Board and the supreme court.

(6) To appear at hearings conducted with respect to petitions for reinstatement

of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, to examine witnesses and to submit evidence, if any, relevant thereto.

(7) To maintain permanent records of all matters processed and the disposition thereof.

(8) To assist members of the public in preparation of requests for investigation.

(9) To perform such other duties and provide such reports as the Board shall direct.

(Renumbered September 1984.)

2.7 Procedure.

(a) Investigation. All investigations, whether upon complaint or otherwise, shall be conducted by and under the supervision of Counsel. Upon the conclusion of an investigation, Counsel shall recommend

dismissal, informal admonition of the attorney concerned or the institution of formal disciplinary proceedings before a hearing committee. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that purpose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of the Counsel's recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

(b) Formal Hearing. Formal disciplinary proceedings before a hearing committee shall be instituted by Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent. The respondent shall serve his answer upon Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Chairman. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairman to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect.

Following the service of the answer or upon failure to answer, the matter shall be assigned by the Chairman to a hearing committee. If there are any issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard in mitigation, the hearing committee shall serve a notice of hearing upon Counsel and the respondent, or his counsel, stating the date and place of the hearing. At every hearing wherein factual issues are to be resolved, the respondent shall have a full opportunity to confront and cross examine the complainant and the other witnesses presented by Counsel and to present evidence on his own behalf. The hearing committee shall, in every case, submit a report containing its findings and recommendations, together with a record of its proceedings, to the Board within 60 days after the

conclusion of its hearing, including the submission of briefs, if any. The findings of the hearing committees shall be supported by a preponderance of the evidence. The hearing committee shall not be bound by the formal rules of evidence, but it shall admit only trustworthy evidence. The hearing committee shall not rely upon any evidence outside the formal record in reaching its decision.

(c) Review by Board and Supreme Court. Upon receipt of a report from a hearing committee, the Board shall set the dates for submission of briefs and for oral argument before the Board. The Board shall promptly either affirm or modify the recommendation of the hearing committee, remand the matter for further proceedings before the hearing committee or dismiss the petition. In the event that the Board

determines that the proceeding should be concluded by private or public reprimand, if the respondent shall consent thereto he shall appear before the Board at a time fixed by the Chairman and the Chairman shall either deliver the reprimand or shall advise the respondent that the Board shall impose a public reprimand. Unless the Board shall dismiss or remand the petition or the matter is concluded by private or public reprimand with the consent of the respondent, the Board shall promptly submit a report containing its findings and recommendations, together with the entire record, to the supreme court. After the filing of such report, a copy thereof shall be served on the respondent. If the respondent objects to the report, then within 40 days after the filing of the report the respondent shall file an opening brief pursuant to the rule

governing civil appeals, and other brief may be filed and oral argument may be had as therein provided. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984; further amended March 7, 1986, effective March 7, 1986.)

2.8 Immunity. Complaints submitted to the Board or Counsel or testimony given with respect thereto shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, Counsel and staff shall be immune from suit and liability for any conduct in the course of their official duties.

(Renumbered September 1984.)

2.9 Refusal of Complainant to Proceed, Compromise, etc. Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

(Renumbered September 1984.)

2.10 Matters Involving Related Pending Civil or Criminal Litigation. Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.

(Renumbered September 1984.)

2.11 Service.

(a) Service upon the respondent of

the petition or order to show cause in any disciplinary proceeding shall be made by personal service by any person authorized by the Chairman of the Board, except that in the event the respondent cannot be found within the state or has departed therefrom, service may be made by registered or certified mail at his address shown in his registration statement filed pursuant to Rule 2.18 or other last known address. If neither personal service nor service by mail can be effected successfully, service shall be made by publication once a week for four successive weeks of a notice in a newspaper of general circulation in the circuit of the respondent's last address shown in his registration statement.

(b) Service of any other papers or notices required by these rules shall be made in accordance with Rule 5 of the

Hawaii Rules of Civil Procedure.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.12 Subpoena Power, Witnesses and Pretrial Proceedings. Any member of a hearing committee, in matters before it, and Counsel, in matters under investigation by him, may administer oaths and affirmations, and subject to HRCP Rule 45(b), compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents. A respondent may, subject to HRCP Rule 45(b), compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents before a hearing committee after formal disciplinary proceedings are instituted. Writs of subpoena shall be issued in blank by the clerk of this court upon application by any member of a hearing

committee, Counsel or the respondent. The circuit court of any circuit in which a subpoena is issued or served or in which the attendance or production is required may, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in criminal cases in the circuit courts.

There shall be no discovery proceedings except upon the order of the Chairman of the Board for good cause shown but subject, however, to HRCP Rule 26(c).

At the discretion of the hearing committee, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the chairman of the committee or any

member of the committee designated by its chairman.

(Renumbered September 1984.)

2.13 Attorneys Convicted of Crimes.

(a) Upon the filing with this court of a certificate of a clerk of court demonstrating that an attorney has been convicted (certificate of conviction) of a crime which is, or if it had been committed in Hawaii would have been a felony or which involves dishonesty or false statement, this court shall enter an order immediately restraining the attorney from engaging in the practice of law, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceedings to be commenced upon such conviction. Upon good cause

shown, the court may set aside such order restraining the attorney from engaging in the practice of law when it appears to be in the interest of justice so to do. An order restraining an attorney from the practice of law shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless this court shall so order. Upon being informed that an attorney has been convicted of a crime above described, Counsel shall obtain a certificate of the conviction and file the same with the Board and with the clerk of this court.

(b) The final conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based upon the conviction. For purposes of this rule, a judgment of conviction is deemed final when the avail-

ability of appeal has been exhausted and the time for filing a petition for certiorari in the United States Supreme Court on direct review of the judgment of conviction has elapsed and no petition has been filed, or if filed the petition has been denied or the judgment of conviction has been affirmed.

(c) Upon the receipt of a certificate of conviction of an attorney of a crime described in (a) above, whether or not the attorney shall be restrained from the practice of law, this court shall refer the matter to the Board for the institution of a formal proceeding in which the sole issue to be determined shall be the extent of the discipline to be imposed, provided that a disciplinary proceeding so instituted shall not be brought to hearing until the judgment of conviction is final, unless the respondent

shall so request.

(d) Immediately upon the filing with this court of a certificate demonstrating that the underlying conviction for a crime has been reversed, any order entered under the provisions of (a) above restraining the attorney from the practice of law shall be vacated, any formal proceeding then pending against the attorney found solely upon such conviction shall be terminated and any discipline imposed in any such formal proceeding shall be vacated, but the reversal of the conviction shall not terminate or affect any formal proceeding previously or thereafter instituted founded upon alleged misconduct by the attorney, whether or not involving the same facts alleged to constitute the crime or offense of which the attorney was convicted.

(Renumbered September 1984.)

2.14 Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution.

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of grounds for his discipline may consent to disbarment, but only by delivering to the Board an affidavit stating that he desires to consent to disbarment and that:

(1) his consent is freely and voluntarily rendered; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting his consent;

(2) he is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his discipline, the nature of which he shall specifically set forth;

(3) he acknowledges that the material facts so alleged are true; and

(4) he submits his consent because he knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he could not successfully defend himself.

(b) Upon receipt of the required affidavit, the Board shall file it with this court and this court shall enter an order disbarring the attorney on consent.

(c) The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court or as otherwise allowed by these rules.

(Amended July 29, 1981, effective July

29, 1981; renumbered September 1984.)

2.15 Reciprocal Discipline.

(a) Any attorney disciplined by any foreign or domestic jurisdiction, whether state, federal, or local, has a duty to notify Counsel promptly of the imposition of that disciplinary action. In addition, the disciplined attorney shall promptly obtain a certified copy of the order imposing that discipline and file it with this court and the Board.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this state has been disciplined in another jurisdiction, this court shall forthwith issue a notice directed to the attorney containing: (1) a copy of said order from the other jurisdiction; and (2) an order directing that the attorney inform the court, within 30 days

from service of the notice, of any claim by the attorney that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor.

(c) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, this court shall impose the identical discipline unless Counsel or the attorney demonstrates, or this court finds that upon the face of the record upon which the discipline is predicated it clearly appears, (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) that the misconduct established warrants substantially different discipline in this state. Where this court determines that any of said elements exist, this court shall enter such other order as it deems appropriate.

(d) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

(Amended July 29, 1981, effective July 19, 1981; renumbered September 1984.)

2.16 Disbarred or Suspended Attorneys.

(a) A disbarred or suspended attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or adminis-

trative proceedings, of his disbarment or suspension and his consequent inability to act as an attorney after the effective date of his disbarment or suspension and shall advise said clients to seek legal advise elsewhere.

(b) A disbarred or suspended attorneys shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, each of his clients who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his disbarment or suspension and consequent inability to act as an attorney after the effective date of his disbarment or suspension. The notice to be given to the client shall advise the client of the desirability of the prompt substitution of

another attorney or attorneys in his place.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended attorney to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(c) Orders imposing suspension or disbarment shall be effective 30 days after entry. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry

date of the order and its effective date he may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(d) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with this court an affidavit showing: (1) that he has fully complied with the provisions of the order and with these rules; (2) all other state, federal and administrative jurisdictions to which he is admitted to practice; and (3) that he has served a copy of such affidavit upon Counsel. Such affidavit shall also set forth the residence or other address of the disbarred or suspended attorney where communications may thereafter be directed to him.

(e) The Board shall cause a notice of

the suspension or disbarment to be published in a newspaper of general circulation in the judicial circuit in which the disciplined attorney maintained his practice.

(f) The Board shall promptly transmit a certified copy of the order of suspension or disbarment to all judges of the State of Hawaii, and the administrative judge of each judicial circuit shall make such further order as he deems necessary to fully protect the rights of the clients of the suspended or disbarred attorney.

(g) A disbarred or suspended attorney shall keep and maintain records of the various steps taken by him under these rules so that, upon any subsequent proceeding instituted by or against him, proof of compliance with these rules and with the disbarment or suspension order will be available. Proof of compliance with these

rules shall be a condition precedent to any petition for reinstatement.

(Renumbered September 1984.)

2.17 Reinstatement.

(a) No suspended or disbarred attorney may resume practice until reinstated by order of this court except as provided in Rule 2.18.

(b) A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least five years after the effective date of the disbarment and shall not be reinstated unless he can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements imposed by the court, which

may include successful completion of requirements for passing the bar examination. An attorney suspended from practice may not apply for reinstatement until the expiration of at least one-half of the period of suspension and shall not be reinstated unless he can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements imposed by the court, which may include the successful completion of requirements for passing the bar examination.

(c) Petitions for reinstatement by a disbarred or suspended attorney shall be filed with the Board and served upon Counsel. Upon receipt of the petition, the Board shall refer the petition to a hearing

committee. The hearing committee shall promptly schedule a hearing. At the conclusion of the hearing, the hearing committee shall promptly submit to the Board a report containing its findings and recommendations, together with the record of the proceedings before it. The Board shall review the report of the hearing committee and the record and shall submit a report containing its findings and recommendations, together with the record, to this court, which shall promptly enter an appropriate order.

(d) This court shall direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.18 Periodic Assessment of Attorneys.

(a) Every attorney admitted to practice before this court shall pay to the Board an annual registration fee for each fiscal year beginning July 1. The registration fee shall be set by the court from time to time and shall be administered and used by the Board to defray the costs of disciplinary administration and enforcement under these rules. The annual fee until further order of the court shall be:

On or After Date of Admission to Practice Law	Annual Fee
First Year, or portion thereof, through Fourth Year	$ 50.00
Fifth Year through Eighth Year	$100.00
Ninth Year and thereafter	$150.00

(b) Full-time judges shall be exempt from the payment of such fee for such time as they serve in office.

(c) To facilitate the collection of the annual fee provided for in (a) above, each person required by this rule to pay an annual fee shall, on or before July 15 of every year, file with the Board a registration statement, on a form prescribed by this court, setting forth the person's current residence and office addresses and such other information as this court may from time to time direct. In addition to such registration statement, every attorney shall file with the Board a supplemental statement of any change in the information previously submitted within 30 days of such change. Each person first becoming subject to these rules by admission to the practice of law before the courts of this state shall, at the time of admission, file the registration statement required by this rule and pay the full annual fee for the

year of admission as provided in (a) above.

(d) Any attorney who fails to pay, on or before July 15 of each year, the fee required under (a) above and/or to file the registration statement required under (c) above, shall thereupon be required to pay, in addition to said registration fee, a late processing charge of $20.00; provided, however, that if said attorney is thereafter suspended by the clerk of this court under (e) below, the late processing charge provided under (f) below shall apply.

(e) Any attorney who fails to make the required payments and/or to file the registration statement or supplement thereto in accordance with the requirements of (a), (c), and (d) above shall be summarily suspended by the clerk of this court, provided that a notice of failure to make the required payment sand/or to file the

statement or supplement thereto has been forwarded by the Board to such attorney by certified mail addressed to the attorney's last known business address at least 15 days prior to such suspension. The attorney shall remain suspended and ineligible to practice law until the attorney complies with the requirements of (a) and (c) above, and (f) below at which time the attorney shall be reinstated by the clerk of this court without further order.

(f) Any attorney suspended under the provisions of (e) above shall be reinstated by the clerk of this court without further order upon payment to the Board of (i) all arrears, and (ii) in lieu of the late processing charge set forth in (d) above, a late processing charge of $40.00.

(g) Within 30 days of the receipt of a statement or supplement thereto filed by

an attorney in accordance with the provisions of (c) above, the Board shall acknowledge receipt thereof, on a form prescribed by this court, in order to enable the attorney on request to demonstrate compliance with the requirements of (a), (c), and (d) above.

(h) An attorney who is in compliance with (a), (c), and (d) above, but who has retired or is no longer engaged in practice in this jurisdiction, may advise the Board in writing that the attorney desires to assume inactive status and discontinue the practice of law. Upon the filing of such notice, together with a processing fee in the sum of $10.00, the attorney shall be placed on inactive status and shall no longer be eligible to practice law. An attorney on inactive status shall not be obligated to pay the registration fee imposed by this rule upon active practi-

tioners. The Board shall advise the clerk of this court of the names of all attorneys who assume inactive status.

(i) Upon the filing of a notice to assume inactive status, an attorney shall be removed from the roll of those classified as active until and unless the attorney requests and is granted reinstatement to the active roll. Reinstatement shall, unless the attorney is subject to an outstanding order of suspension or disbarment, be granted by the clerk of this court without further order, upon the payment to the Board of the registration fee for the year the request is made.

(Amended April 16, 1979, effective April 16, 1979; further amended November 20, 1979, effective November 20, 1979; renumbered September 1984; further amended March 7, 1986, effective July 1, 1986.)

2.19 Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated.

(a) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, this court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of this court. A copy of such order shall be served upon such attorney, his guardian, and/or the director of the institution to which he has been committed in such manner as this court may direct.

(b) Whenever the Board shall petition this court to determine whether an attorney is incapacitated from continuing the practice of law by reason of physical or

mental infirmity or illness or because of the use of drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as this court shall designate. If, upon due consideration of the matter, this court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him to inactive status on the ground of such disability for an indefinite period and until the further order of this court. Any pending disciplinary proceeding against an attorney shall be held in abeyance.

This court shall provide for such notice to the respondent attorney of proceedings in the manner as it deems

proper and advisable and shall appoint an attorney to represent the respondent if he is without adequate representation.

(c) If, during the course of a disciplinary proceeding, the respondent contends that he is suffering from a disability by reason of mental or physical infirmity or illness, or because of the use of drugs or intoxicants, which makes it impossible for the respondent to defend himself adequately, this court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of (b) above.

If this court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it

deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) The Board shall cause a notice of transfer to inactive status to be published in a newspaper of general circulation in the judicial circuit in which the disabled attorney maintained his practice.

(e) The Board shall promptly transmit a certified copy of the order of transfer to inactive status to all judges of the State of Hawaii and shall request such action under the provisions of Rule 2.20 as may be indicated in order to protect the interests of the disabled attorney and his client.

(f) No attorney transferred to inactive status under the provisions of this rule may resume active status until reinstated by order of this court. Any

attorney transferred to inactive status under the provisions of this rule shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as this court may direct in the order transferring the respondent to inactive status or any modification thereof. Such application shall be granted by this court upon a showing that the attorney's disability has been removed and he is fit to resume the practice of law. Upon such application, this court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as this court shall designate. In its discretion, this court may direct that the expense of such an examination shall be paid by the

attorney.

Where an attorney has been transferred to inactive status by an order in accordance with the provisions of (a) above, and, thereafter, in proceedings duly taken, he has been judicially declared to be competent, this court may dispense with further evidence that his disability has been removed and may direct his reinstatement to active status upon such terms as are deemed proper and advisable.

(g) The filing of an application for reinstatement to active status by and attorney transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of his disability. The attorney shall be required to disclose the name of every psychiatrist,

psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since his transfer to inactive status and he shall furnish to this court written consent to each to divulge such information and records as requested by court-appointed medical experts.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.20 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or is Transferred to Inactive Status Because of Disability.

(a) Whenever an attorney has been transferred to inactive status because of incapacity or disability, or disappears or dies, and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, the

circuit court of any circuit in which such attorney maintained an office, upon proper proof of the fact, shall appoint an attorney or attorneys to inventory the files of the inactive, disappeared, or deceased attorney and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased attorney and his clients.

(b) Any attorney so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

(Renumbered September 1984.)

2.21 Administration and Finances. All matters relating to the administration

and finances of the Board, including the annual budget provided for in Rule 2.4(e)(7), shall be subject to review by the court.

(Amended November 20, 1979, effective November 29, 1979; renumbered September 1984.)

2.22 Confidentiality.

(a) General Rule. The files, records and proceedings of the Board, the hearing committees and Counsel, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

(1) As between Counsel, the committees, the Board and the court in the furtherance of their duties;

(2) As between the Board, Counsel and

an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice;

(3) Upon the request of the attorney affected;

(4) Where permitted by this court;

(5) Where required or permitted by these rules;

(6) Where the investigation is predicated upon a conviction of the respondent for a crime;

(7) Where this court enters an order transferring the respondent to inactive status pursuant to Rule 2.19.

(b) An affidavit consenting to disbarment submitted pursuant to Rule 2.14 shall be submitted to the hearing committee, to the Board and to this court at any time

that the disbarred attorney applies for reinstatement. Such affidavit shall also be supplied to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice.

(c) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the respondent, the Board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing without pre-judgment, and to state that the respondent denies the allegations. The statement shall be first submitted to the respondent involved for

his comments and criticisms prior to its release, but the Board in its discretion may release the statement as originally prepared.

(d) Except as ordered by this court, or as otherwise provided by these rules, the files, records and proceedings filed with this court by the Board, by Counsel or by a respondent, as well as any oral argument held before the court in connection with any disciplinary proceedings, are not confidential. However, where the Board has concluded that the sole discipline should be a public or private reprimand by the Board, and where the respondent has declined to consent to such discipline, the proceedings shall remain confidential pending review by the supreme court, unless and until the court imposes public discipline or the Board imposes public discipline

pursuant to a remand by the court. Similarly where the sole discipline recommended by the Board is public censure by the supreme court, the proceedings shall remain confidential unless and until the court imposes public discipline.

(e) In addition, the Board shall transmit notice of all public discipline imposed by this court, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.23 Interim Suspension.

(a) If at any time during the pendency of an investigation or a disciplinary proceeding, it appears that the continuation of an attorney's authority to practice law is causing or is likely to cause serious

harm to the public, Counsel may request the Chairman of the Board to appoint three Board members to serve on a committee whose function will be as follows:

(1) The committee will issue an Order to Show Cause to the respondent directing him to appear before the committee within five days of the service of the Order to Show Cause upon him. At the hearing on the Order to Show Cause, Counsel shall present evidence and/or witnesses to the committee to substantiate his allegations that the respondent's continued privilege of practicing law during the pendency of the disciplinary proceedings is causing or is likely to cause serious harm to the public. The respondent shall have the right to appear at the hearing and to present evidence and/or witnesses opposed to the Order to Show Cause.

(2) After conducting the hearing, if the committee concludes that respondent's authority to practice law during the pending disciplinary proceedings is causing or is likely to cause serious harm to the public, the committee shall enter its findings and direct Counsel to file a petition with this court requesting that respondent's license to practice law be immediately suspended, pending the outcome of the disciplinary proceedings.

(3) Upon the filing of such a petition with this court, this court shall immediately enter an order directing the respondent attorney to show cause why he should not be placed on an interim suspension. If no good cause is shown, the court shall enter an order of interim suspension which shall remain in full force and effect until further order of the court.

(b) An order imposing an interim suspension on an attorney under this rule shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless this court shall otherwise order.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984.)

2.24 District Court Practitioners. District Court Practitioners shall be subject to the exclusive disciplinary jurisdiction of this court and the Disciplinary Board. All provisions of Rule 2, as amended and the Code of Professional Responsibility shall limit the conduct of District Court Practitioners. The annual fee for District Court Practitioners shall be $20.

(Renumbered July 29, 1981; further renumbered September 1984.)

2.25 Effective Date. These rules

shall become effective on July 1, 1974, and any disciplinary investigation pending on that date shall be transferred to the Board, provided that any case then pending with respect to which a formal hearing has been commenced shall be concluded under the procedure existing prior to the effective date of these rules.

(Renumbered July 29, 1981; further renumbered September 1984.)

APPENDIX D

NO. 10226

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

[Filed August 8, 1986]

ROY M. MIYAMOTO, Appellant, vs. OFFICE OF DISCIPLINARY COUNSEL, Appellee.	)	ODC 1125

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that ROY M. MIYAMOTO, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Order of Suspension, entered herein on April 18, 1986, and the Order denying Appellant's Motion For

Reconsideration of Order of Suspension, entered herein on May 15, 1986.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

APPENDIX E

DB 19 Records. (a) Evidence; Proceedings. Each hearing committee shall record and preserve in writing, on tape, or by the use of such other mechanical device as may be appropriate, the proceedings and evidence in disciplinary proceedings assigned to it. In designating the manner of recording and preserving the proceeding, the committee may include any provision to assure that the record will be accurate and trustworthy. Unless otherwise ordered argument need not be recorded, but motions, requests, objections, offers of proof, and the rulings of the hearing committee shall be recorded. The committee shall keep minutes in each case. If the record is not preserved by stenographic means, the minutes shall set out, as a minimum, the wintesses, exhibits, motions, requests,

objections, offers of proof, and rulings, in such manner and with such references as will enable the record to be reviewed as needed.

References

HRS Sections 91-9, 604-17, 606-8, and 606-12.

H.R.C.P. Rule 30(b)(4).

Pa. Board Rule 89.101.

(b) Depositions. A deposition upon oral examination may be recorded by any means agreed upon by the parties, and in the absence of agreement, as ordered by the Chairman of the Board under DB 11(f).

References.

H.R.C.P. Rule 30(b)(4).

(c) Shorthand Reporters. If the record is to be preserved by senographic

means, a shorthand reporter shall be appointed by the committee, or employed by a party at his own expense after the committee has found him qualified, and except as stipulated by the parties with the approval of the committee, the reporter's notes shall be promptly transcribed at the expense of the party employing him, or as an official expense if his appointment was a committee decision.

References

Rule 16.7(b) and (c), requiring submission of the record.

HRS Sections 91-9(f); H.R.C.P. Rule 30(b)(4).

Pa. Board Rule 89.101.

(d) Transcripts. Except as provided by the proceeding paragraph, the record need not be transcribed unless ordered by

the hearing committee or Board as an official expense, or ordered by a party at his own expense. The original of each transcript shall be filed with the record. However, the record made pursuant to paragraphs (a) to (c) constitutes the official record, unless the accuracy of the transcript is stipulated by the parties or determined by proceedings before the committee or Board, as the case may be.

References

HRS Sections 91-9(f), 606-13 (third par.); H.R.C.P. Rule 75(b); D.C.R.C.P. Rule 75(b).

Pa. Board Rules 89.101 and 89.103.

(e) Record to be transmitted. The record of a formal proceeding shall consist of the entire file, including all papers filed with the hearing committee or Board

commencing with the petition for discipline, but excluding all prior communications and reports unless otherwise ordered by the Chairman of the Board; committee and Board decisions and reports; the record of the proceedings and evidence made pursuant to paragraphs (a) to (c) togethere with the exhibits; the transcript, if any; and copies of the committee and Board minutes. With the approval of the Chairman of the Board the parties may stipulate that designated parts of the record need not be transmitted to the Supreme Court, as provided in HRCP Rule 75(a). The record shall be prepared for filing in the Supreme Court in accordance with Supreme Court Rule 7, to the extent practicable.

References

Rule 16.7)b), (c); HRS Section 91-9(3); H.R.C.P. Rule 75(a); Supreme Court Rule

7; Cir. Ct. Rule 2.

Pa. Board Rules 89.173 and 89.206.

APPENDIX F

§16-201-36 Hearings. All hearings shall be conducted pursuant to chapter 91, HRS, and this chapter. All hearings shall be heard before the authority or a duly designated hearings officer. All parties shall be afforded full opportunity to present evidence and argument on all issues involved. The hearing shall be at the time and place set forth in the notice of hearing, but at that time and place may be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing. The authority or hearings officer, if there is no dispute as to the facts involved in a particular matter, may permit the parties to proceed by memoranda of law in lieu of a hearing unless the procedure would unduly burden any party or

is otherwise not conducive to the ends of justice. [Eff 7/11/81; am and comp 1/25/85] (Auth: HRS §§91-2, 26-9) (Imp: HRS §§91-9, 92-16, 26-9)

§16-201-37 Procedure at hearing. Unless otherwise stipulated by the parties, which stipulation is approved by the authority or the hearings officer, all hearings shall proceed as follows:

(1) The parties shall have the opportunity to make opening statements before any evidence is presented, unless they waive the opportunity. The opening statement shall be heard in the following order:

(A) Petitioner's opening statement; and

(B) Respondent's opening statement, unless respondent chooses to reserve same until after presentation of petitioner's

evidence;

(2) The petitioner's evidence shall be presented first, and shall be followed by the presentation of evidence in support of respondent's case;

(3) After presentation of the evidence in support of their respective cases, the parties shall have the opportunity to introduce rebuttal evidence. Rebuttal evidence shall be introduced in the same order as was followed with respect to the introduction of evidence in support of their respective cases;

(4) Each witness shall be examined first by the party calling the witness before cross-examination by the opposing party;

(5) After all evidence, including rebuttal evidence, has been presented, the parties shall have the opportunity to make

final argument. Final argument shall proceed as follows:

(A) Petitioner's final argument;

(B) Respondent's final argument; and

(C) Petitioner's final argument in rebuttal which shall be limited to countering matters raised in respondent's final argument; and

(6) The hearing shall be deemed closed after completion of all final arguments or upon filing of all permitted memoranda and other post hearing submissions or upon the expiration of the time allowed for filing submissions, unless the time is extended, or upon the completion of taking further evidence pursuant to section 16-201-39, whichever is later. [Eff 7/11/81; am and comp 1/25/85] (Auth: HRS §§91-2, 26-9) (Imp: HRS §§91-9, 91-10,

92-16, 26-9)

APPENDIX G

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and

order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to Chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions; but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it

is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities

in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the adminstrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L 1961, c 103, §14; Supp. §6C-14; HRS §91-14; am L 1973, c 31, §5; am L 1974, c 145, §1]

Supreme Court, U.S.
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No. 86-263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROY M. MIYAMOTO,
Appellant,

v.

OFFICE OF THE DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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October 1986

QUESTION PRESENTED

Whether the procedures employed by the Supreme Court of Hawaii to discipline Appellant, who was suspended from the practice of law in the State of Hawaii for 18 months, violated Appellant's due process and equal protection rights under the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	2
ARGUMENT	10
1. Appellant presents nothing more than arguments this Court rejected in Mildner v. Gulotta	10
a. By summarily affirming Mildner v. Gulotta on direct appeal, this Court rejected the attack on the constitutionality of New York's attorney disciplinary procedure ...	11
b. The issues decided in Mildner v. Gulotta are substantially identical to the issues raised here	16
2. The Hawaii attorney disciplinary procedure did not deprive Appellant of the due process required for proceedings of that nature	22

Page

3. The Hawaii attorney disciplinary procedure did not deprive Appellant of his rights under the equal protection clause 43

CONCLUSION 48

TABLE OF AUTHORITIES

Cases	Page
Andros, In re, 64 Ill. 2d 419, 356 N.E.2d 573 (1976)	25
Attorney General v. Lane, 259 Mich. 283, 243 N.W. 6 cert. den. 287 U.S. 654 (1932)	23
Barsky v. Board of Regents of the University of the State of New York, 347 U.S. 442 (1954)	34-36
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)	24
Cain v. Board of Commissioners of the Alabama State Bar, 345 So. 2d 1343 (Ala. 1977)	37
Capshaw, In re, 65 S. Ct. 673 (1945), and 67 S. Ct. 1345 (1947)	42

Cases	Page
Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke, 276 N.W.2d 838 (Iowa) appeal dismissed, 444 U.S. 805 (1979)	36
Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Michelson, 345 N.W.2d 112 (Iowa 1984)	40
Corn Exchange Bank v. Coler, 280 U.S. 218, 222-223 (1930)	41
Crow, In re, 359 U.S. 1007 (1959)	42
Disciplinary Board of the Hawaii Supreme Court v. Kim, 59 Hawaii 449, 583 P.2d 333 (1978)	25, 27, 33, 39
Echeles, In re, 430 F.2d 347 (7th Cir. 1970)	23, 28
Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972) ...	46

Cases	Page
Gerzof v. Gulotta, 395 N.Y.S.2d 26 (1977)	15
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974)	15
Herring v. New York, 422 U.S. 853 (1975)	26
Hicks v. Miranda, 422 U.S. 332 (1975)	16
Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974)	44-45
Kaiser, Matter of, 489 N.Y.S.2d 735 (1985)	37, 40
Kitsis v. State Bar, 153 Cal. Rptr. 836, 592 P.2d 323 (1979)	33
Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971)	21
Logan, Matter of, 70 N.J. 222, 358 A.2d 787 (1976) ...	33, 47

Cases	Page
Maddy v. First Dist. Committee of Virginia State Bar, 205 Va. 652, 139 S.E.2d 56 (1964)	23
Mathews v. Eldridge, 424 U.S. 319 (1976)	24, 31
McComb v. Commission on Judicial Performance, 19 Cal. 3d S 1, 138 Cal. Rptr. 459, 564 P.2d 1 (1977)	23
Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), affirmed, 425 U.S. 901 (1976)	10-21, 37, 47
Morales, In re, 35 Cal. 3d 1, 196 Cal. Rptr. 353, 671 P.2d 857 (1983)	40
Morgan v. United States, 298 U.S. 468 (1936)	30
Morrissey v. Brewer, 408 U.S. 471 (1972)	23

Cases	Page
MTM Inc. v. Baxley, 420 U.S. 799 (1975)	14
Noell, In re, 93 F.2d 5 (8th Cir. 1937)	38
Osceola v. Kuykendall, et al., 434 U.S. 914 (1977)	14
Ownbey v. Morgan, 256 U.S. 94 (1921)	41
People v. Hartmann, 638 P.2d 745 (Colo. 1981)	26
People v. Hickman, 204 Cal. 470, 268 P. 909 (1928)	41
Petty, In re, 29 Cal. 3d 356, 173 Cal. Rptr. 461, 627 P.2d 191 (1981)	25, 28
Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973)	22

Cases	Page
Pordum v. Board of Regents of the State of New York, 491 F.2d 1281 (2d Cir. 1974)	44
Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. den., 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985)	29
Ruffalo, In re, 390 U.S. 544 (1967)	22
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935)	44
Spencer v. Spencer, 434 U.S. 807 (1977)	14
Stivers v. Minnesota, 429 U.S. 1084 (1977)	14
Stout, Matter of, 122 Ariz. 503, 596 P.2d 29 (1979)	25, 28
Theard v. United States, 354 U.S. 278 (1957)	45

Cases	Page
Trask, In re, 46 Hawaii 404, 380 P.2d 751 (1968) ...	39
Tully v. Griffin, Inc., 429 U.S. 68 (1976)	16
United States v. Raddatz, 447 U.S. 667 (1980)	29-31
United States v. Vater, 259 F.2d 667 (2d Cir. 1958)	21
Walker v. Supreme Court of Arkansas Committee on Professional Conduct, 275 Ark. 158, 628 S.W.2d 552 (1982)	34
Wall, Ex Parte, 107 U.S. 265, 27 L. Ed. 552 (1883)	22, 41, 42
Walton, In the Disciplinary Matter Involving, 676 P.2d 1078 (Alaska 1983)	34
Wireman, In the Matter of, 270 Ind. 344, 367 N.E.2d 1368 (1977)	32, 40

Cases	Page
Zuckerman v. Greason, 231 N.E.2d 718, 285 N.Y.S.2d 1, cert. den., 390 U.S. 825 (1967)	22
Statutes and Rules	
Hawaii Rev. Stat., chapter 91	43
Hawaii Rev. Stat. § 605-1	46
Rule 2, Rules of the Supreme Court of Hawaii	2-6, 27, 32
12 U.S.C. § 1253	14, 15
28 U.S.C. § 636(b)(1)(B)	29
42 U.S.C. § 1983	16
Other	
American Bar Association, Survey of Lawyer Disciplinary Procedures in the United States (1984)	41
R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978)	32

No. 86-263

IN THE

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ROY M. MIYAMOTO,
Appellant,

v.

OFFICE OF THE DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of

the Supreme Court of Hawaii on the ground that the questions presented are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This appeal raises the question of whether the procedures employed by the Supreme Court of Hawaii to discipline Appellant, an attorney licensed to practice law in Hawaii, violated Appellant's due process and equal protection rights under the United States Constitution. The procedures are set out in Hawaii Supreme Court Rule 2, which has been submitted as Appendix C to the Jurisdictional Statement.

An attorney licensed to practice law in Hawaii is subject to the exclusive disciplinary jurisdiction of the Hawaii Supreme Court. Hawaii Supreme Court Rule 2.1. The Hawaii

Supreme Court appoints an eighteen member Disciplinary Board to serve in an adjunct capacity to the court in all disciplinary proceedings. Hawaii Supreme Court Rule 2.4. The Disciplinary Board, in turn, appoints a Disciplinary Counsel who makes all preliminary investigations of attorney misconduct. Upon the conclusion of this initial investigation, Disciplinary Counsel recommends to the Disciplinary Board either dismissal, informal admonition of the attorney concerned, or the institution of formal disciplinary proceedings before a Hearing Committee. This recommendation is reviewed by one of the two members of the Disciplinary Board assigned by the Board Chairman for this purpose. Hawaii Supreme Court Rules 2.4 & 2.7.

If the reviewing member of the Disciplinary Board, in accordance with the recommendation of the Disciplinary

Counsel, believes that the Disciplinary Board should institute formal disciplinary proceedings, he or she authorizes the Disciplinary Counsel to notify the accused attorney of the specific charges of alleged misconduct. Next, the Chairman of the Disciplinary Board refers the matter to a three-member Hearing Committee. The Disciplinary Board appoints all Hearing Committees. At least two of each committee's three members must be members of the Hawaii bar. Hawaii Supreme Court Rules 2.5 & 2.7.

A formal hearing of the alleged misconduct takes place in front of the Hearing Committee. Where factual issues are to be resolved, the accused attorney has the full opportunity to confront and cross-examine the complainant and other witnesses presented by the Disciplinary Counsel. The accused attorney may also present evidence on his or her own

behalf. At the conclusion of the hearing, the Hearing Committee must submit to the Disciplinary Board a report containing its findings and recommendations, including any previously submitted briefs. Hawaii Supreme Court Rule 2.7(b).

Upon receipt of the Hearing Committee Report, the Disciplinary Board must set a date for the submission of briefs and for oral arguments before the Board. After oral argument, the Board must either affirm or modify the recommendation of the Hearing Committee, remand the matter for further proceedings before the Hearing Committee or dismiss the petition. Next, the Disciplinary Board must submit a report containing its findings and recommendations, together with the entire record, to the Hawaii Supreme Court. If the accused attorney objects to the Disci-

plinary Board's report, he or she may submit a brief with the court stating his or her position. Hawaii Supreme Court Rule 2.7(c).

The Hawaii Supreme Court Rules do not obligate the court to grant the accused attorney the opportunity of oral argument before it. Furthermore, the Disciplinary Board's recommendation is not binding upon the Hawaii Supreme Court. The court may affirm or dismiss any portion of the Disciplinary Board's findings. Lastly, the Hawaii Supreme Court does not have to submit findings of fact or conclusions of law in its final order on the matter.

The procedures were followed in the case of Appellant. The Disciplinary Counsel recommended that disciplinary proceedings be initiated, and the matter was referred to a Hearing Committee. After reviewing evidence and argument,

the Hearing Committee unanimously adopted findings of fact which held, in essence, that Appellant had altered a letter from a physician concerning a medical opinion (by inserting the word "not" into the letter) and had submitted the altered letter as evidence to a hearings officer conducting an administrative hearing to determine whether Appellant's client was entitled to receive worker's compensation benefits. Concluding that Appellant had thereby violated several of the Disciplinary Rules contained in the Code of Professional Responsibility, as adopted in Hawaii, the Hearing Committee recommended that Appellant be suspended from the practice of law for three years.

The Hearing Committee's Findings of Fact, Conclusions of Law, and Recommendation for Discipline were submitted to the Disciplinary Board. After

considering a brief from Appellant, an answering brief from the Disciplinary Counsel, and a reply brief from Appellant, and after hearing oral argument, the Board unanimously (among those members participating) determined that the findings of fact made by the Hearing Committee were supported by the evidence, and adopted and affirmed the findings of fact, the conclusions of law, and the recommendation of the Hearing Committee.

The Report and Recommendation of the Disciplinary Board was submitted to the Supreme Court of Hawaii, along with the record. Appellant submitted an opening brief, the Disciplinary Counsel filed an answering brief, and Appellant filed a reply brief. Among the arguments presented by Appellant was the contention that the recommended sanction of suspension for three years was too

harsh in light of Appellant's good record and of caselaw from Hawaii and other jurisdictions imposing lesser sanctions for similar offenses. Thereafter, the Hawaii Supreme Court unanimously entered an Order of Suspension (Appendix A to the Jurisdictional Statement), concluding that suspension of Appellant was necessary, but reducing the period of suspension to 18 months. Appellant subsequently filed a motion for reconsideration, but that motion was denied (Appendix B to the Jurisdictional Statement). This appeal followed.

Appellant does not claim that the Hawaii Supreme Court failed to follow its established procedure in any substantial or material way. Rather, Appellant argues that the Hawaii attorney disciplinary procedure as a whole violates accused attorneys' due process and equal protection rights.

ARGUMENT

1. APPELLANT PRESENTS NOTHING MORE THAN ARGUMENTS THIS COURT REJECTED IN MILDNER v. GULOTTA

Appellant's Jurisdictional Statement is in form and substance an edited version of the dissenting opinion in Mildner v. Gulotta, 405 F. Supp. 182, 201-229 (E.D.N.Y. 1975),[1/] a case wherein the majority of a three-judge district court panel upheld the constitutionality of the New York attorney disciplinary procedure. This Court rejected those views when it summarily affirmed the panel's majority decision on direct appeal. Mildner, 425 U.S. 901 (1976).

1/ Curiously, Appellant failed to cite this case in his Jurisdictional Statement.

a. By summarily affirming Mildner v. Gulotta on direct appeal, this Court rejected the attack on the constitutionality of New York's attorney disciplinary procedure.

This Court's affirmance of the decision in Mildner v. Gulotta clearly rejected the constitutional arguments raised by the plaintiffs. Nevertheless, some confusion as to what exactly the district court decided could arise from a casual reading of the lower court's three opinions. The district court panel considered two broad issues: (1) whether the New York attorney disciplinary procedure violated the United States Constitution, and (2) whether the doctrine of judicial abstention prevented the district court panel from disposing of the case on its merits, e.g., on constitutional grounds.

The panel upheld the constitutionality of the New York attorney dis-

ciplinary procedure, 2 - 1. The opinion which stated the decision of the court was written by Judge Neaher, who concluded that plaintiffs' constitutional claims were without merit. Mildner, 405 F. Supp. at 199. Judge Moore concurred on the constitutional issues, stating that he would "hold that New York's procedures for disciplining its attorneys are constitutional for the reasons stated in Judge Neaher's opinion." Id. Judge Weinstein, on the other hand, dissented and concluded that the New York attorney disciplinary procedures denied accused attorneys due process. Id. at 229.

The panel also held, 2 - 1, that the doctrine of abstention did not prevent the court from reaching the merits of the case. Judge Neaher believed that the court should dismiss the complaints based on the doctrine of

abstention, and he expressed that view in the lead opinion. 405 F. Supp. at 199. But that position was not adopted by a majority of the court. Judge Moore believed the court should dismiss the complaints, not on the basis of abstention, but on the "merits" of the constitutional claims. Id. Judge Weinstein also concluded that the doctrine of abstention was inapplicable. Id. at 207.

In sum, the panel held that: (1) the New York attorney disciplinary procedure did not violate the United States Constitution; and (2) the doctrine of abstention did not apply, such that it was necessary to reach the merits of the constitutional claim.

This Court was obviously aware of these holdings when it affirmed the district court judgment upon plaintiffs' direct appeal from the three-judge

district court panel under 28 U.S.C. § 1253. This Court has stated that it has no jurisdiction to hear a direct appeal from a three-judge district court when the district court panel did not reach the merits of plaintiff's constitutional attack, but instead based its order on the doctrine of abstention. MTM Inc. v. Baxley, 420 U.S. 799, 804 (1975). In other words, this Court would never have "affirmed" the district court decision if the district court had disposed of the case on the grounds of abstention. Rather, the Court would have dismissed the appeal for want of jurisdiction, Osceola v. Kuykendall, et al., 434 U.S. 914 (1977); Spencer v. Spencer, 434 U.S. 807 (1977), or would have remanded the case to the district court for a fresh order from which a timely appeal could have been taken to the court of appeals. Stivers v. Minne-

sota, 429 U.S. 1084 (1977). The Court would therefore not have taken jurisdiction of the appeal if it believed the district court case was decided on the basis of abstention rather than the constitutional issues. Gerzof v. Gulotta, 395 N.Y.S.2d 26, 27 (1977).

By way of summary affirmance, this Court must therefore have ruled on the merits of the constitutional issues raised in Mildner, as discussed in the dissenting opinion and repeated by Appellant here. As this Court stated in Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), direct appeal from a district court panel under 28 U.S.C. § 1253 "authorizes direct review by this Court . . . as a means of accelerating a final determination on the merits." The fact that this Court summarily affirmed Mildner is of no import; summary disposition of an appeal

is still a disposition on the merits. Tully v. Griffin, Inc., 429 U.S. 68 (1976); Hicks v. Miranda, 422 U.S. 332 (1975).

b. The issues decided in Mildner v. Gulotta are substantially identical to the issues raised here.

Mildner involved three consolidated civil rights actions brought under 42 U.S.C. § 1983 to test the constitutionality of the procedures used by the State of New York to discipline attorneys charged with professional misconduct. Under the New York procedure, the Appellate Division of the Supreme Court of New York had the exclusive jurisdiction to discipline members of the New York bar. Initially, courts and attorneys would refer complaints concerning potential attorney misconduct to a bar association grievance committee. The Appellate Division empowered the grievance committee to

make a preliminary investigation of the complaint and recommend to the Appellate Division whether the court should institute formal disciplinary proceedings, a recommendation the court normally adopted.

Once the Appellate Division instituted formal disciplinary proceedings, the court would refer the proceedings to a referee to conduct a hearing, take testimony, and report to the court findings of fact, conclusions of law, and a recommendation as to the disposition of the case. The findings and recommendation of the referee were in no way binding on the court. Upon motion by either party, or upon its own initiative, the court could affirm or disaffirm, in whole or in part, the referee's report. The Appellate Division could, and at times did, substitute its judgment for that of the

referee. Indeed, in two of the three cases involved in Mildner, the referees had concluded that the charges against the accused attorneys had not been sustained by the evidence, but the Appellate Division held otherwise, finding the charges sustained by the proof. In its consideration, the court was not obligated to afford an oral hearing or oral argument concerning adoption, modifications, or rejection of the report. Furthermore, the court was not obligated to include written findings in its final order.

Essentially, the plaintiffs in Mildner attacked the constitutionality of the New York disciplinary procedure on the same due process and equal protection grounds put forth by Appellant here. Speaking for the two-judge majority, Judge Neaher stated, "In our examination of the parties' submissions

we have found no substantial merit in the plaintiffs' claims and conclude that the respective complaints should be dismissed." Mildner, 405 F. Supp. at 185.

The court held that due process did not require the ultimate trier of fact in attorney disciplinary proceedings to hear witnesses and accused attorneys personally either through oral argument or a de novo hearing. Mildner, 405 F. Supp. at 195. In reaching this conclusion the court noted that "the use of masters or referees as advisory triers-of-fact is a well-established instrument of busy appellate courts exercising original jurisdiction." Id. Furthermore, the court held that due process only required the court to review and consider the referee's report, it did not require the court to provide written findings of fact and

conclusions of law. Id. Lastly, with respect to the plaintiffs' equal protection claim, the court focused on the unique nature of attorney disciplinary proceedings and the special relationship between courts and attorneys, holding that the state could legitimately find reasons to conclude that different procedural safeguards were appropriate for different professions. Id. at 193.

The procedure used by the State of Hawaii to discipline attorneys is closely analogous to the New York procedure reviewed and upheld in Mildner. The Supreme Court of Hawaii (the highest court in the State of Hawaii) has the ultimate authority in all Hawaii disciplinary cases. It acts upon the nonbinding recommendations of a disciplinary board and hearing committee, the body before which formal hearings

occur. And, as the present case reveals, the Hawaii Supreme Court Rules do not obligate the court to hear testifying witnesses or the accused attorney personally and do not require the court to produce written findings of fact and conclusions of law. In sum, the disciplinary procedure currently under attack is substantially equivalent to the disciplinary procedure this Court upheld in Mildner, 425 U.S. 901 (1976).[2/]

2/ Again, this is not surprising, given the fact that Appellant's arguments are taken from a dissenting opinion rejected first by the district court majority and then by this Court. Actually, Appellant's Jurisdictional Statement is sprinkled with arguments courts have rejected. On at least two occasions Appellant quotes language from cases without acknowledging that the quoted language came from dissents. See, Jurisdictional Statement at 32 and 42, quoting Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 174 (1971) (Black, J., dissenting); United States v. Vater, 259 F.2d 667, 674 (2d Cir. 1958) (Lumbard, J., dissenting).

2. THE HAWAII ATTORNEY DISCIPLINARY PROCEDURE DID NOT DEPRIVE APPELLANT OF THE DUE PROCESS REQUIRED FOR PROCEEDINGS OF THAT NATURE

Appellant evaluates Hawaii's attorney disciplinary procedure only by reference to what he calls its "quasi-criminal" nature. In so doing, Appellant misinterprets, and consequently misapplies, constitutional standards applicable to these proceedings. Besides referring to attorney disciplinary proceedings as "quasi-criminal", In re Ruffalo, 390 U.S. 544, 551 (1967), reh. denied, 391 U.S. 961 (1968), this Court and others have called such proceedings "civil" in nature. Ex Parte Wall, 107 U.S. 265, 27 L. Ed. 552, 561 (1883); Polk v. State Bar of Texas, 480 F.2d 998, 1002 (5th Cir. 1973); Zuckerman v. Greason, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6, cert. den., 390

U.S. 825 (1967); Attorney General v. Lane, 259 Mich. 283, 243 N.W. 6, 8, cert. den., Lane v. Voorhies, 287 U.S. 654 (1932). Courts have also referred to these proceedings as "sui generis." In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970); McComb v. Commission on Judicial Performance, 138 Cal. Rptr. 459, 463, 564 P.2d 1, 5 (1977); Maddy v. First Dist. Committee of Virginia State Bar, 205 Va. 652, 139 S.E.2d 56, 60 (1964). Clearly, labelling the nature of attorney disciplinary proceedings is an exercise in semantics that does not itself determine the substantive constitutional limitations to be applied in this context.

Due process is a flexible concept which tolerates variations and requires only those procedural protections as a particular situation may demand. Morrissey v. Brewer, 408 U.S.

471, 481 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). The dictates of due process therefore fall upon a sliding scale that varies depending upon the particular procedure under scrutiny. In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), this Court set forth three factors to consider in determining a particular procedure's due process requirements: (1) the private interests implicated; (2) the risk of erroneous determination through the use of the procedures and the probable value of added procedural safeguards; and (3) the public interest and administrative burdens, including costs that additional procedures would entail. Applying this test to the Hawaii attorney disciplinary procedure confirms that the Hawaii procedure amply protects accused attorneys' due process rights.

Appellant asserts that his due process rights derive from the personal interests in his reputation and livelihood at stake in the disciplinary procedure. Nevertheless, Appellant over-analogizes the proceedings to a criminal trial. The deprivation to be suffered by the accused attorney is not the same as that of a convicted felon, and the point of the proceeding is not to inflict punishment. Regardless of the varying labels courts have placed on attorney disciplinary proceedings, courts agree that these proceedings are not criminal or punitive in nature. In re Petty, 29 Cal. 3d 356, 173 Cal. Rptr. 461, 627 P.2d 191, 193 (1981); Matter of Stout, 122 Ariz. 503, 596 P.2d 29, 30 (1979); Disciplinary Board of Hawaii Supreme Court v. Kim, 59 Hawaii 449, 583 P.2d 333, 337 (1978); In re Andros, 64 Ill. 2d 419, 356 N.E.2d 573, 574

(1976). Accordingly, the due process rights of an attorney "do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case." People v. Hartmann, 638 P.2d 745, 747 (Colo. 1981).[3/]

The next consideration is the risk of erroneous determination and the probable value of additional safeguards. The thrust of Appellant's claim is that in order for the Hawaii Supreme Court to make a reliable credibility assessment, it must hear the accused attorney and witnesses personally. The findings of fact of the Hawaii disciplinary proceedings are reviewed not once, but twice. After the Hearing Committee makes a determination, its

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3/ Any criminal case Appellant cites to support his arguments is therefore inapposite. See, e.g., Jurisdictional Statement at 37-38 citing Herring v. New York, 422 U.S. 853 (1975).

findings and recommendations are submitted to the Disciplinary Board. Hawaii Supreme Court Rule 2.7(b). The Disciplinary Board then reviews the Hearing Committee's report and briefs submitted by the accused attorney and the Disciplinary Counsel, and hears oral argument by both sides. Hawaii Supreme Court Rule 2.7(c). Only after the proceedings get to this stage does the Disciplinary Board submit its report to the Hawaii Supreme Court. The Disciplinary Board's findings are advisory only and the Hawaii Supreme Court can accept, reject, or modify any of the Board's findings. Disciplinary Board of Hawaii Supreme Court v. Kim, 59 Hawaii 449, 451, 583 P.2d 333, 335 (1978). This kind of scrutiny actually enhances the reliability of the findings, since in briefs to both the Disciplinary Board and the Hawaii Supreme Court, the

accused attorney is afforded the opportunity to single out and attack perceived weaknesses in the evidence, to alert each entity of the need to exercise discretion, and to urge that a de novo hearing would be appropriate.

The last factor to consider is the public interest at stake and the burden posed by additional safeguards. The public has a great interest at stake in attorney disciplinary proceedings. Their purpose is "to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice." In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970); see also, In re Petty, 173 Cal. Rptr. 461, 627 P.2d 191 (1981); Matter of Stout, 122 Ariz. 503, 596 P.2d 29 (1979). In the present case, requiring a de novo hearing in

front of the Hawaii Supreme Court would plainly frustrate the purpose of the Disciplinary Board as an adjunct structure to the court, which was plainly "designed to free the supreme court from the burden of developing the entire record for adjudication itself." Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1437 (10th Cir. 1984), cert. den., 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985).

This Court faced similar issues in United States v. Raddatz, 447 U.S. 667 (1980), where the Court upheld a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), which permitted a district court to refer a suppression motion to a magistrate, and authorized the district court to decide the motion based on the record developed before the magistrate, including the magistrate's proposed proposed findings

of fact and recommendations. In Raddatz, as in the present case, the core of the challenge to the statute was "[t]he one who decides must hear." Raddatz, 447 U.S. at 677, quoting Morgan v. United States, 298 U.S. 468, 481 (1936).4/

The Court in Raddatz held that the statute did not violate Raddatz's right to procedural due process. 447 U.S. at 680. In so deciding, the Court

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4/ Appellant relies on Morgan v. United States, 298 U.S. 468 (1936) to support his "the one who decides must hear" argument. Jurisdictional Statement at 36. Morgan also stated that the rule requiring that the one who decides must hear "does not preclude practicable administrative aid in obtaining the aid of assistants in the department. Assistants may prosecute inquires. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by subordinates. Argument may be oral or written. The requirements are not technical." Morgan, 298 U.S. at 481-482. As applied to the Hawaii attorney disciplinary procedure, Morgan therefore does not appear to support Appellant's argument.

recognized that due process requirements vary with the type of procedure under scrutiny and applied the three factors enunciated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Court concluded that the process due at a suppression hearing, despite its potential significance, was less demanding and elaborate than the protections accorded a criminal defendant at the trial itself. Raddatz, 447 U.S. at 679. In such proceedings, due process does not require that the ultimate decisionmaker must be the person hearing the evidence. Id., at 680. In explaining this conclusion, the opinion of the Court in Raddatz noted with approval the analogy of administrative adjudications, where an agency or commission is the ultimate factfinder though the evidence is heard by a hearings officer. That is not an uncommon arrangement. Indeed, this

Court itself uses masters as advisory triers of fact when disputed factual issues appear in original actions. R. Stern & E. Gressman, Supreme Court Practice, Sec. 10.13 at 623-625 (5th ed. 1978). Such a procedure simply cannot be as constitutionally flawed as Appellant contends.

The analysis of Appellant's other due process claims must also begin and end with reference to the nature of attorney disciplinary proceedings.[5/] Appellant asserts that Hawaii Supreme Court Rules 2.4(e)(2) and 2.4(e)(3), by authorizing the Disciplinary Board to appoint the Chief Disciplinary Counsel

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5/ Appellant also contends that due process requires that an accused attorney be afforded the opportunity to conduct discovery. This is not the case. Due process does not require pretrial discovery in attorney disciplinary proceedings. In the Matter of Wireman, 270 Ind. 344, 367 N.E.2d 1368, 1371 (1977).

as well as the Hearing Committee, wrongly consolidate the roles of prosecutor, judge, and jury into the Disciplinary Board and thereby violate his due process right to a full, fair, and impartial hearing. Jurisdictional Statement at 18, n. 8. Appellant's argument misconstrues the functions of the Disciplinary Board, Disciplinary Counsel, and Hearing Committees. These entities are all adjuncts of the Hawaii Supreme Court; it is the Hawaii Supreme Court alone that is the ultimate trier of fact as well as law. Disciplinary Board of Hawaii Supreme Court v. Kim, 59 Hawaii 449, 583 P.2d 333, 335 (1978). See also, Kitsis v. State Bar, 153 Cal. Rptr. 836, 841, 592 P.2d 323, 327-328 (1979); Matter of Logan, 70 N.J. 222, 358 A.2d 787, 788 (1976). As mere agents of the court, there may be some combination of the roles they play in

the disciplinary procedure. In the Disciplinary Matter Involving Walton, 676 P.2d 1078, 1082 (Alaska 1983); Walker v. Supreme Court of Arkansas Committee on Professional Conduct, 275 Ark. 158, 628 S.W.2d 552, 554 (1982).

Appellant claims that due process requires the Hawaii Supreme Court to provide accused attorneys the opportunity to orally argue in front of the court and furthermore requires the court to include written findings of fact and conclusions of law in its final order. Jurisdictional Statement at 39. This Court settled this issue with respect to physician disciplinary procedures in Barsky v. Board of Regents of the University of the State of New York, 347 U.S. 442 (1954). In Barsky, the Board of Regents was the ultimate trier of fact in a physician disciplinary proceeding. The investigation of charges

against the accused physician proceeded on two fronts. First of all, a medical grievance committee relied on hearings conducted by an investigative committee and recommended that the Board of Regents should find the physician guilty as charged and suspend his license for six months. Secondly, a separate Board of Regents committee conducted hearings and recommended that the Board of Regents should not find the physician guilty and not suspend his license. The Board of Regents, without any oral argument in front of it, and without stating its reasons, sustained the medical grievance committee's recommendation and suspended the physician's license for six months. The physician claimed the disciplinary procedure violated his due process rights.

The Court in Barsky found no violation of the physician's due process

rights. 347 U.S. at 456. The Court noted that all that due process required was that the Board of Regents consider both reports before it. With respect to the report that exculpated the physician, the Court stated, "[W]e see no reason to conclude that the board disregarded it or acted arbitrarily, capriciously or through prejudice and deprived appellant of due process of law." Id., at 456.

Courts have followed the precepts set forth in Barsky. With respect to the requirement of submitting written findings of fact and law, the Supreme Court of Iowa has stated, "[W]e are not persuaded that traditional concepts of error preservation must always be imposed in attorney disciplinary proceedings. To do so would be to characterize the procedure as just an unusual lawsuit. It is not." Committee on

Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke, 276 N.W.2d 838, 841 (Iowa), appeal dismissed for want of a substantial federal question, 444 U.S. 805 (1979). Courts have also held that an accused attorney in a disciplinary proceeding does not have a constitutional right to orally argue in front of the ultimate trier of fact where the attorney has fully briefed his or her position to the court. Mildner v. Gulotta, 405 F. Supp. 182, 195 (E.D.N.Y. 1975); Matter of Kaiser, 489 N.Y.S.2d 735, 739 (1985); Cain v. Board of Commissioners of the Alabama State Bar, 345 So. 2d 1343, 1346 (Ala. 1977).

In the present case, the Hawaii Supreme Court stated that it based its order of suspension on "having considered the Disciplinary Board's 'Report and Recommendation for the Suspension of

Roy M. Miyamoto from the Practice of Law for a Period of Three (3) Years' and the briefs and records filed in this court." See Order of Suspension, Appendix A to Jurisdictional Statement. The Hawaii Supreme Court satisfied the requirements of due process by properly considering the material before it.[6/]

Appellant also claims that the Hawaii attorney disciplinary procedure, as applied to his case, violated his due process rights because of minor variations from the Hawaii Supreme Court

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6/ In re Noell, 93 F.2d 5 (8th Cir. 1937), a case on which Appellant relies, Jurisdictional Statement at 40-42, is therefore irrelevant. In In re Noell, the Eighth Circuit held that the Missouri attorney disciplinary procedure violated an accused attorney's due process rights because the ultimate trier of fact did not provide the accused attorney an opportunity to submit oral or written arguments. Such is not the case here. Appellant submitted written briefs to the Hawaii Supreme Court which the court received and reviewed prior to rendering its final order.

Rules.[7/] Even assuming the truth of these allegations, Appellant's assertion of due process violations fails because he has not proved these allegations prejudiced his ability to have the Hawaii Supreme Court adjudicate the

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7/ Appellant also asserts that the Hawaii Supreme Court does not apply a set standard when reviewing the findings of the Disciplinary Board. Jurisdictional Statement at 23, n. 13. He cites Disciplinary Board v. Kim, 59 Hawaii 449, 583 P.2d 333 (1978) (clear and convincing evidence) and In re Trask, 46 Hawaii 404, 380 P.2d 751 (1968) (preponderance of the evidence), to support this proposition. In 1972, the Hawaii Supreme Court replaced its version of the Canons of Professional Ethics with its form of the A.B.A. Code of Professional Responsibility. All that Kim and Trask stand for may be that the Hawaii Supreme Court has determined that different standards of review are applicable to alleged violations of different codes of attorney conduct. Moreover, in Kim the issue before the court was not the standard of proof, so it is not clear that the court intended to articulate a higher standard. More importantly, Appellant fails both to demonstrate that any due process violation is raised here and to establish any prejudice to himself.

complaint fairly. Courts consistently hold that minor procedural irregularities in attorney disciplinary proceedings do not deny an attorney's right to due process absent a showing of prejudice. Matter of Kaiser, 489 N.Y.S.2d 735, 738 (1985); Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Michelson, 345 N.W.2d 112, 117 (Iowa 1984); In re Morales, 196 Cal. Rptr. 353, 671 P.2d 857, 861 (1983); In the Matter of Wireman, 270 Ind. 344, 367 N.E.2d 1368 (1977).

Traditional notions of fairness help define the due process requirements of a particular procedure. Accordingly, this Court has stated, "in all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of

the courts." Ex Parte Wall, 107 U.S. 265, 27 L. Ed. 552, 562 (1883); See also, Corn Exchange Bank v. Coler, 280 U.S. 218, 222-223 (1930); Ownbey v. Morgan, 256 U.S. 94, 108-109 (1921); People v. Hickman, 204 Cal. 470, 268 P. 909, 913 (1928).

Significantly, the Hawaii attorney disciplinary procedure conforms to similar procedures used by other courts. It appears that in a majority of states, the highest court is the final decision-maker in the disciplinary process, but it renders judgment upon the report and recommendation of a separate disciplinary committee that has actually heard and observed the witnesses testify. See American Bar Association, Survey of Lawyer Disciplinary Procedures in the United States (1984). Even this Court appears to recognize a similar procedure when disciplining members of its own

bar, referring disciplinary matters to committees for recommendations and subsequently adjudicating the matters without directly hearing testimony or oral argument from the accused attorneys. See In re Capshaw, 65 S. Ct. 673 (1945), and 67 S. Ct. 1345 (1947); In re Crow, 359 U.S. 1007 (1959) (Douglas, J., dissenting).

In light of the foregoing, it is clear that the Hawaii attorney disciplinary procedure satisfies due process requirements because it is "suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." Ex Parte Wall, 107 U.S. 265, 27 L. Ed. 552, 562 (1883).

3. THE HAWAII ATTORNEY DISCIPLINARY PROCEDURE DID NOT DEPRIVE APPELLANT OF HIS RIGHTS UNDER THE EQUAL PROTECTION CLAUSE

Appellant also claims a violation of his right to equal protection under the law. Jurisdictional Statement at 47-57. Essentially, appellant claims his equal protection rights were violated because the Hawaii attorney disciplinary procedure denies attorneys the full scope of appellate review afforded to other professions in disciplinary proceedings conducted under the Hawaii Administrative Procedure Act, Ch. 91 Hawaii Rev. Stat., and the rules promulgated thereunder.

This Court has made it clear that equal protection does not mean that states must treat all professions the same. As this Court stated with respect to Oregon's procedure for disciplining dentists:

> [The plaintiff has no] ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each.

Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610-611 (1935) (emphasis added). See also, Pordum v. Board of Regents of the State of New York, 491 F.2d 1281, 1286 (2d Cir. 1974). Hence, an accused attorney's equal protection rights must be defined in the same way his or her due process rights are defined, i.e., with due regard to the nature of attorney disciplinary proceedings.

One court has already passed on Appellant's equal protection argument. In Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974), the plaintiff claimed

that the New York attorney disciplinary procedure violated his equal protection rights because it did not provide attorneys the full scope of appellate review afforded other disciplined professionals. The court found no equal protection violation, and in so doing pointed out that "[t]he intimate and delicate relationship between courts and lawyers has long justified the judiciary in careful scrutiny of the integrity and qualifications of those who practice before it." Id. at 141.

This result is best explained by the fact that attorneys are officers of the court. Theard v. United States, 354 U.S. 278, 281 (1957). From this relationship has arisen a unique self-disciplining system. The legal profession alone has a court both as the entity before whom the professional practices and as the tribunal which sits

in judgment on charges of professional misconduct. Appellant's focus on the procedures provided other disciplined professionals therefore ignores the fact that attorney disciplinary proceedings, unlike disciplinary proceedings afforded other professionals, are from the outset judicial rather than administrative in nature. Erdmann v. Stevens, 458 F.2d 1205, 1208-1209 (2d Cir. 1972).

The Hawaii State Legislature has vested the Hawaii Supreme Court with the sole power to revoke or suspend the license of any attorney. Hawaii Rev. Stat. § 605-1 (1976). The foregoing discussion proves a rational basis for treating attorneys and other professionals differently. "Having vested the initial determination function with the courts rather than an administrative agency, the legislature might well have concluded that the obligatory judicial

review normally -- if not presumptively -- required for administrative decisions was not required when the initial determination was by a court." Mildner v. Gulotta, 405 F. Supp. 182, 184 (E.D.N.Y. 1974) (emphasis in original); See also, In the Matter of Logan, 70 N.J. 222, 358 A.2d 787, 791 (1976).

Besides, it is baffling how the Hawaii Supreme Court is supposed to provide the appellate review sought by Appellant. It is, to begin with, the highest court in the state. There is no place left to which to appeal. Although this argument may have been plausible in New York, where the Court of Appeals could possibly be available to review a determination by one of the Appellate Divisions, it makes little sense in Hawaii.

CONCLUSION

For the reasons stated above, this appeal should be dismissed or the decision of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

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